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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

DAVID BAIRD, ROZELLE BOYD, WILLIAM D. CRAWFORD, GLENN HOWARD and PAUL JONES,
Petitioners,

vs.

CONSOLIDATED CITY OF INDIANAPOLIS, WILLIAM H. HUDNUT III, MAYOR OF THE CITY OF INDIANAPOLIS, THE CITY-COUNTY COUNCIL OF THE CONSOLIDATED CITY OF INDIANAPOLIS, PHILIP BORST, DAVID BROOKS, RICHARD F. CLARK, DWIGHT COTTINGHAM, BEULAH COUGHENOUR, CARLTON CURRY, WILLIAM A. DOWDEN, ALLEN L. DURNIL, KENNETH H. GIFFIN, GORDON G. GILMER, HAROLD HAWKINS, HOLLEY M. HOLMES, RAY IRVIN, DAVID F. McGRATH, BEVERLY MUKES-GAITHER, STUART RHODES, BETTY RUHMKORF, WILLIAM SCHNEIDER, JULIUS F. SHAW, BUERT SERVASS, JOHN SOLENBERG, STANLEY F. STRADER, STEPHEN R. WEST, SUSAN WILLIAMS, FAYE MOWERY, as Marion County Clerk, MARION COUNTY ELECTION BOARD, CHARLES APPELGATE, and JOHN SCHWARTZ,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Can summary judgment properly be granted when the three *Thornburg v. Gingles*, 478 U.S. 30 (1986), factors are shown and when many of the Senate (Senate Report No. 97-417 (1982)) factors are present?

II. Is the Seventh Circuit's decision in conflict with *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986) regarding the proper grant of summary judgment?

III. Is the Seventh Circuit's decision in conflict with *Gingles* and 42 U.S.C. 1973 by failing to engage in a "district specific" analysis of the challenged election practice?

IV. Did the Seventh Circuit err in holding that 42 U.S.C. 1973(b) creates a "complete defense" of "current racial proportionality?"

V. Did the Seventh Circuit err in failing to perform an adequate "totality of the circumstances" analysis?

VI. Did the Seventh Circuit err in overvaluing the recent remedial efforts caused by this litigation?

LIST OF PARTIES

The names of all parties to the proceeding in the court below appear in the caption of the case.

Information required by Rules of the Supreme Court, Rule 29.1:

None of the parties are publicly or privately held corporations or companies.

The City of Indianapolis is a municipal corporation.

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CONSOLIDATED CITY OF INDIANAPOLIS, WILLIAM H. HUDNUT III, MAYOR OF THE CITY OF INDIANAPOLIS, THE CITY-COUNTY COUNCIL OF THE CONSOLIDATED CITY OF INDIANAPOLIS, PHILIP BORST, DAVID BROOKS, RICHARD F. CLARK, DWIGHT COTTINGHAM, BEULAH COUGHENOUR, CARLTON CURRY, WILLIAM A. DOWDEN, ALLEN L. DURNIL, KENNETH H. GIFFIN, GORDON G. GILMER, HAROLD HAWKINS, HOLLEY M. HOLMES, RAY IRVIN, DAVID F. McGRATH, BEVERLY MUKES-GAITHER, STUART RHODES, BETTY RUHMKORF, WILLIAM SCHNEIDER, JULIUS F. SHAW, BUERT SERVASS, JOHN SOLENBERG, STANLEY F. STRADER, STEPHEN R. WEST, SUSAN WILLIAMS, FAYE MOWERY, as Marion County Clerk, MARION COUNTY ELECTION BOARD, CHARLES APPELGATE, and JOHN SCHWARTZ,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUITT

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered on September 30, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 976 F.2d 357 (7th Cir. 1992) and appears in the Appendix at pages 1-9 (Hereinafter referred to as "A1-9").

The opinion of the District Court for the Southern District of Indiana (Barker, *D.J.*) has not been reported and appears at (A10-21).

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. 1973, petitioners brought this suit in the Southern District of Indiana. The District Court granted summary judgment on October 23, 1991.

On Petitioners' appeal, the Seventh Circuit affirmed the District Court's grant of summary judgment in respondents' favor on September 30, 1992. No petition for rehearing, or for rehearing *en banc*, was filed.

Jurisdiction to review the judgment of the Seventh Circuit in this cause by a writ of certiorari is conferred on this Court by 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

The text of 42 U.S.C. 1973 is reproduced verbatim in the appendix (A61).

The text of Indiana Code provisions I.C. 36-3-4-3 is reproduced verbatim in the appendix (A62).

STATEMENT OF THE CASE

On February 6, 1987 the original complaint in this action was filed. An amended complaint was filed on October 26, 1989 alleging that the twenty-five (25) City-County Council districts, each electing one member to the Council of the Consolidated City of Indianapolis and County of Marion (hereinafter "Council"), violated the Voting Rights Act, 42 U.S.C. 1971 *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Amended Complaint also alleged that the at-large district, consisting of the entire county and electing four (4) members to the Council, violated the Voting Rights Act.[1] The current at-large district has existed in each of the prior five (5) elections since the "unification" of certain aspects of Indianapolis and Marion County government in 1969.[2]

An agreed upon partial remedy for the discrimination was provided when the district court approved a consent decree on September 25, 1990 (A44). The decree required the Respondents to redistrict before the next Council elections, then scheduled for May 1991, and required the Council to consider abolishing, or changing the manner of voting for, at-large councilors (A46).

The Respondent Council, in partial compliance with the Consent Decree, redistricted in March of 1991 and created seven (7) African-American majority districts. The Council refused to either abolish, or modify the manner of electing at-large councilors (A9).

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[1] I.C. 36-3-4-3 (b) and (c) describes the manner of electing Councilors from the at-large district (A68).

[2] Indianapolis and Indiana first used the at-large district election to intentionally discriminate against ethnic Germans in 1849. At-larges have been used since. *See, Bryant v. Whitcomb*, 419 F. Supp 1290, 1292 n.1 (S.D. Ind. 1970).

Petitioners filed an amended complaint on April 2, 1991 which continued to challenge the manner of election from the at-large district. Petitioners requested preliminary relief. At the April 17, 1991 preliminary hearing injunction, the three (3) preconditions for relief under Section 2 were proven as set forth in *Thornburg v. Gingles*, 478 U.S. 30, 51-52 (1986) (*See* A29-35). Respondents did not dispute that African-Americans in Indianapolis are sufficiently large and geographically compact to constitute a majority in a single-member district; are politically cohesive; and, that the racially-polarized white majority votes sufficiently as a block to enable it to always defeat the minority's preferred candidates for the seats elected from the at-large district.

Evidence was presented that many of the "Senate factors" (Senate Report No. 97-417, pp. 28-29 (1982)) supportive of a Section 2 violation are present in Indiana and Indianapolis. The only governmental justification presented by the Respondents for the at-large district was that it assured the mayor's political party control of the council (A64).

In its April 25, 1991 entry the trial court denied the Petitioners' Motion for Preliminary Injunction observing that the "Council [had taken] advantage of the opportunity to redistrict itself [and] achieve more proportional representation." (A42). It further held that "proportional representation on the Council [as a whole] satisfies the Section 2 requirement that they [Marion County African-Americans] have equal access to the political process." (A43).

On June 14, 1991 Respondents filed their Motion for Summary Judgment asserting as the only basis that since the new districts might result in "racial

proportionality on the Council", retaining the at-large district unchanged did not "*per se*" dilute the minority vote in Marion County. On October 23, 1991 the district court summarily entered judgment against Petitioners (A10-21). This decision incorporated its "proportionality" analysis from its April 25, 1991 entry (A22-43).

On November 21, 1991 Petitioners filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit.[3] On January 6, 1992 Petitioners filed their initial brief. On February 10, 1992 Respondents filed a response. On February 25, 1992 Petitioners filed a reply brief. On May 20, 1992 the case was argued. On September 30, 1992, the United States Court of Appeals for the Seventh Circuit upheld the district court's entry of summary judgment favoring Respondents (A1-9).

On December 27, 1992 Petitioners obtained an extension of time until February 27, 1993 in which to file a petition for a writ of certiorari.

[3] The Petitioner's request for attorney's fees and costs filed September 3, 1991 remains in the District Court, has been fully briefed, but the District Court has yet to rule.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

The Seventh Circuit's decision is in conflict with the standards for granting summary judgment set out in *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Petitioners raised substantial issues of material fact tending to prove that, using the "totality of the circumstances test" required by both *Thornburg v. Gingles*, 478 U.S. 30, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986) and the Voting Rights Act, 42 U.S.C. 1973(a), that the at-large district has a racially discriminatory effect by preventing African-Americans from electing at-large councilors.

II.

The Seventh Circuit's decision conflicts with *Gingles, cited above*, and 42 U.S.C. 1973(a) by:

a. failing to engage in a "district specific" analysis of the challenged election practice as required by the Voting Rights Act;

b. holding that 42 U.S.C. 1973(b) creates a "complete defense" of "current racial proportionality";

c. failing to perform a "totality of the circumstances" analysis; and,

d. overvaluing recent remedial efforts.

The Seventh Circuit erred in upholding the trial court's grant of summary judgment by ignoring the requirement of a "district specific" examination of an electoral device to determine whether it has a discriminatory effect; extending the doctrine of

"persistent proportional representation" far beyond the facts of the case and the law described in *Gingles*; and by giving far too much weight to recent remedial measures taken in response to this litigation.

The decision confuses admissible evidence, *i.e.*, current "proportionality" in the racial makeup of a legislative body, with a complete defense, *i.e.*, "persistent proportional representation" from the district which elects to the legislative body. The lower court's "geographical overlap" exception to a district-specific analysis is inconsistent with *Gingles* and Section 2.

The lower court errs by transforming what is merely admissible "totality of the circumstances" evidence into an unvarnished, and simplistic "complete defense" to Section 2 liability. This doctrinal error is compounded with the erroneous conclusion that "recent proportional representation on the council" is the equivalent of *Gingles*' "persistent proportional representation" from a district electing to a council. The lower court thus has completely misread Congressional intent in enacting 42 U.S.C. 1973(b).

This is a case of first impression and the Seventh Circuit erred in upholding summary judgment[4] in a Voting Rights Act case after the Petitioners established the three *Gingles* criteria and the presence of some Senate factors.

Petitioner established that the at-large district electing four (4) councilors failed the three-prongs of the *Gingles* test and raised substantial issues of material fact regarding the following:

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[4] The Seventh Circuit's opinion in *Baird* is devoid of a discussion of F.R.Civ.P. Rule 56 and its application to Voting Rights Act litigation.

a. the presence of several of the Senate factors supportive of violation of a Section 2;

b. whether the political processes leading to election in Indianapolis and Marion County are equally open to participation by African-Americans;

c. whether a valid governmental purpose exists that can justify an at-large district, which has had, and will continue to have, a racially discriminatory effect;

d. whether the at-large district was initially enacted with the specific intent to dilute the voting strength of an ethnic minority;

e. whether the at-large district was subsequently maintained for the stated purpose of assuring one-party hegemony in municipal government; and,

f. whether, as a part of the settlement process of the instant litigation, the at-large district was not modified with the specific purpose of perpetuating the discriminatory effect against a political minority.

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment only if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Only when there is a "complete failure of proof concerning an essential element of the non-moving party's case" is the moving party "entitled to judgment as a matter of law." *Celotex* at 323.

Petitioners established the three (3) *Gingles* elements of proof and raised substantial issues of material fact about the existence of many of the "Senate factors," and are thus entitled to a full consideration of their Section 2

claim (A31). Petitioners are entitled to present evidence of impact of white crossover voting and the motivation behind the adoption and retention of the at-larges. *See, McNeil v. Springfield Park District,* 851 F.2d 937, 942, 943 n.9 (7th Cir. 1988), cert. den., 490 U.S. 1031 (1989); *Garza v. County of Los Angeles,* 918 F.2d 763 (9th Cir. 1990), *cert. den.,* 501 U.S. _____, 111 S. Ct. 681, 112 L. Ed. 2d 673 (1991).

A substantial issue of material fact exists about whether the challenged "voting qualification or prerequisite to voting or standard, practice or procedure" results "in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" and thus prevents summary judgment. Summary judgment should be denied if there is a substantial issue of material fact that "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by" African-Americans in Indianapolis and Marion County "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973.

Councilor Boyd's affidavit (A50-60), the contents of which were ignored by the lower courts, raises numerous issues of material fact regarding the Senate factors sufficient to warrant a full trial on the merits. He testified that electing four (4) councilors at-large has the racially discriminatory effect of never allowing an African-American candidate of choice to be elected to an at-large seat.

Petitioners established the following Senate factors:

1. Marion County and Indiana both have long histories of official "general racial discrimination" and "the political process in Indianapolis and Marion County is not equally open to minority voters."[5] (A56).

2. The unification of Indianapolis and Marion County government, including the creation of the challenged at-large district, "was intended to and had the effect of preventing any African-American from being elected Mayor of Indianapolis."[6] (A56-57).

3. All Council districting plans (1971, 1974 and 1982) since unification intentionally "packed" African-Americans into four (4) single-member districts, and "cracked" the balance into districts where they constituted sizable, but ineffective, voting minorities. African-Americans could have constituted effective voting majorities in at least six (6) districts in the 1970's

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[5] Parts of the legislation which "unified" Indianapolis with Marion County have been found to be the product of intentional racial discrimination. Public schools were intentionally excluded from the unification in order to perpetuate racial discrimination. Indianapolis and the State of Indiana intentionally operated a segregated school system through 1971 and remain subject to a court-ordered remedy. *See, United States v. Board of School Commissioners,* 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd,* 474 F.2d 81 (7th Cir. 1973), *cert. denied,* 413 U.S. 920 (1973); 368 F. Supp. 1191 (S.D. Ind. 1973), *aff'd,* 503 F.2d 68 (7th Cir. 1974), *cert. denied,* 421 U.S. 929 (1975); 419 F. Supp. 180, 183 (S.D. Ind. 1975), *aff'd,* 541 F.2d 1211 (7th Cir. 1976), *vac. on other grounds and remanded,* 429 U.S. 1068 (1978), *decision on remand,* 456 F. Supp. 183 (S.D. Ind. 1978), *aff'd,* 637 F.2d 1101 (7th Cir. 1980), *cert. den.* Indiana's "long history of both public and private discrimination against its black citizens" was noted at 637 F.2d at 1106. Unigov was enacted in this backdrop of discrimination. 637 F.2d at 1107, 1110.

[6] Compare *Gomillion v. Lightfoot,* 364 U.S. 339, 5 L. Ed. 2d 110, 110 S. Ct. 125 (1960).

and seven (7) districts in the 1980's (A31-32). Indiana and Marion County have long had an affinity for multi-member election districts.[7]

4. In the recent past, "the Indianapolis Police Department would park patrol cars outside polling places on election day in an attempt to intimidate and suppress Black voter turnout." (A52). Election recounts have "targeted inner city precincts and . . . had the affect (sic) to intimidate minority voters and minority precinct workers." (A52).

5. Constant modifications of single-member council district boundaries and the at-large councilors were used to assure white domination of special taxing districts, called Special Service District Councils, that control police and fire services, and prevented "[b]lack council members from obtaining a working majority on the Special Service District Councils."[8] (A53-54).

6. A slating fee for the at-larges is charged which affects "the African-American community more than the majority white community from seeking or obtaining a party's endorsement." (A56).

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[7] *Whitcomb v. Chavis*, 403 U.S. 124 (1970) (county-wide state legislative district); *Davis v. Bandemer*, 478 U.S. 109 (1986); and, *Dickinson v. Indiana State Election Board*, 933 F.2d 497 (7th Cir. 1991) (3 member state legislative districts). In 1991 the *Dickinson* case finally ended the practice in Marion County of having all state representatives elected from multi-member Districts. All nine (9) townships in Indianapolis-Marion elect *all* of their officers at-large. *See* fn. 14 following.

[8] The Special Service District Councils have been the subject of prior constitutional litigation. *See, Bryant v. Whitcomb*, 419 F. Supp. 1290 (1976); *Cantwell v. Hudnut*, 419 F. Supp. 1301 (S.D. Ind. 1976); *aff'd*, 566 F.2d 30 (7th Cir. 1977) *cert. den.*, 439 U.S. 1114, 59 L. Ed. 2d 71, 99 S. Ct. 1015 (1978). *See* fn. 10, also.

7. African-Americans in Marion County bear the effects of past intentional discrimination in such areas as education, employment and health which hinders their ability to participate effectively in the political process. Income levels vary in Indianapolis between whites and blacks. The effect of official and historical discrimination is evidenced by the fact that Marion County whites have a lower level of unemployment, a higher educational level, a higher income level and a greater percentage of home ownership than African-Americans (A33-36).

8. There have been recent racial appeals in political campaigns for municipal office[9] (A52).

9. There is a long history of lack of proportional representation of African-Americans, not only in electing single-member district councilors and at-large councilors, but on the Council as a whole and also in *all* other elective offices in Marion County. "(T)here has never been an at-large candidate, either white or African-American, for the City-County Council nominated and elected by Black voters." There are nine (9) townships in Marion County. Township government was excluded from unification. All township officers are elected at-large from a district consisting of the township. There are no African-American Township Small Claims Court Judges. There are only three (3) African-American Township Board members of the twenty-seven (27).

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[9] While this case was under consideration in the court of appeals, the 1992 campaign for Indiana Attorney General featured the Republican white male candidate for Attorney General carting a life-sized standup photograph of his Democratic African-American female opponent to predominately white rural areas of Indiana, placing it on the podium next to him, and commenting on the fact that she was not there. The obvious purpose of such a display was to educate members of the audience of the race of his opponent and pander to those who might cast their vote based upon race.

There are no elected African-American Township Constables. There is only one (1) African-American Township Trustee. There are no African-American Township Assessors and no African-American has ever been elected to a county-wide administrative or executive office such as mayor, treasurer, auditor, prosecutor, clerk, sheriff, recorder, assessor or coroner (A57-59).

10. Local government, including the at-larges are non-responsive and show a significant historical, and contemporary, disparity in the distribution of all types of governmental services by race in Indianapolis. "African-American areas of Indianapolis receive inferior city services such as street and sidewalk cleaning, street and sidewalk repair, fire protection, police protection, flood control, and storm sewers." (A56).

11. The effect of the at-large district is that African-Americans' candidates of choice will never win an at-large seat.

12. The justification for electing councilors at-large is tenuous and questionable. The Respondents asserted that the at-large district was adopted to *assure* a particular political outcome (Affidavit of Beurtt SerVaas submitted in support of Respondents Motion for Summary Judgment) (emphasis added).

13. The District Court "could almost take judicial notice of the (racial) discrimination." (A42). Prior *de jure,* and *de facto,* racial discrimination, meant that "African-Americans did not have an equal opportunity to express their interests, and that the prejudiced attitude of white citizens would permit things to continue without change." (A42).

The lower court's decision that there was no substantial issue of material fact is in conflict with *LULAC v. Clements*, No. 90-8014 (5th Cir. 1993) Slip *opinion January 27, 1993.* There the Fifth Circuit held that "[P]roof of some or all of these factors raises an inference that racial discrimination is responsible for minority plaintiffs unequal opportunity to participate in the political process." at 12. If the Petitioners presented evidence of several Senate factors, then there is an evidentiary inference which prohibits summary judgment. But even in the face of this evidence, summary judgment was granted by the trial court and Petitioners, even though having made a *prima facie* showing of dilution under *Gingles*, were not permitted to proceed to trial and were thus never given the opportunity to "develop a full record"; *McNeil*, at 942. Thus the District Court was not able to conduct the "searching practical evaluation of the 'past and present reality' ", *Id.* at 940, required by Section 2. The lower court's misapplication of *Celotex* is apparent in the tentative nature with which the "critical" factual conclusions are stated. The lower court concluded that "losses by the candidates black voters prefer *may* have more to do with politics than race" (A7). The lower court further concludes, without citing any evidence to support the conclusion, that "(v)oters in Marion County *seem* to prefer Republicans, but do not necessarily judge their Republicans by color." (A8) (emphasis added). Neither Petitioners nor Respondents presented evidence, during the summary judgment proceedings, as to *why* Marion County African-Americans vote the way they do and only presented evidence that African-Americans do vote a particular way.

The lower court concluded "that nothing in the record suggests intentional discrimination against black persons." This is contradicted by the unchallenged testimony of Rozelle Boyd (A50-60), contrary to the record and clearly erroneous under F.R.Civ.P. 52(a). The Petitioners should be able to examine, at trial, the issues of material fact regarding motivation behind the initial adoption of the at-large and its "partisan" conscious retention.[10]

The ruling directly conflicts with *Gingles* and *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988) *cert. den.*, 489 U.S. 1080, 109 L. Ed. 2d 1534, 103 S. Ct. 839 (1989) (holding that the courts should have focused only on actual voting patterns rather than speculating on reasons why minority voters voted). *Gingles* rejected such a "partisan" argument. *Id.* at 62-63.

The lower court erred in two ways by injecting partisan politics. First, there was no evidence in the record proving *why* African-Americans do not vote for Republican candidates. The obvious inference is that local Republican candidates are not responsive to the needs of Marion County African-Americans.

Second, there is no controlling precedent giving voter intent such determinative effect. "[F]ailure of [this] particular evidence, . . . amounts to harmless error." *LULAC* at 13. The lower court erred by relying upon *Whitcomb v. Chavis*, 403 U.S. 124 (1970) to conclude

[10] There is no effective difference between the current manner of election from the at-large district and an ordinance which reads "No candidate of choice of African-Americans in Indianapolis shall be elected to the Council from the at-large district. Only the candidates of choice of whites will be elected to this office." Thus the statute reserves all at-large councilors to persons approved by the racially-polarized white voters.

that candidates preferred by African-Americans lose elections "because" they are Democrats and not "because" of any vote dilution caused by the use of multi-member districts. *Id.* at 153. *Whitcomb* only stands for the proposition that where "there is evidence of partisan voting or interest group politics *and no evidence* that members of the minority group have an unequal opportunity to participate in the political process on account of race or color, the minority group's vote dilution claim will fail." (emphasis added) *LULAC* at 194. Section 2 eliminated the "invidious intent" requirement of cases like *Whitcomb* and *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The lower court's reliance on *Whitcomb* conflicts with Congressional intent. *Whitcomb*-type evidentiary conclusions are clearly wrong in light of *Garza*.

The lower court holding that the act of retaining the at-large councilors, which was done with a partisan discriminatory intent, and has a racially discriminatory effect, is not actionable because its "just politics" is unsupported by the evidence. "[P]artisanship evidence does not purport to establish that minority voters are able to participate in the political process and elect representatives of their choice . . . [and] does not detract from evidence suggesting that minority voters' unequal opportunity to participate in the political process is linked to race." *LULAC* at 201. "[P]artisanship evidence does not demonstrate the absence of general racial animus in the electorate, and it does not" rebut evidence of "unequal opportunity to participate in the political process on account of race or color." *LULAC* at 203. It seems unimportant whether the at-large district has the effect of discriminating against African-Americans because of their race or because they don't vote Republican—it impairs the efficacy of African-Americans' votes—and is a resurrection of the "intent"

test that the 1982 amendments meant to eliminate. Proof of one is evidence of the other. There is no effective difference between intentional political discrimination against the political party of African-Americans and political discrimination against African-Americans. *See,* B. Grofman, Ed., "*Toward a Coherent Theory of Gerrymandering: Bandemer and Thornburg*" in *Political Gerrymandering* at p. 28 [1990]. This is intentional discrimination against an identifiable political group having the discriminatory effect of "consistently (degrading) a . . . group of voters' influence on the political process as a whole." *Davis v. Bandemer,* 478 U.S. 109, 127, 132, 106 S. Ct. 2797, 92 L. Ed. 2d 85 (1986). The *Baird* decision is thus in conflict with *Republican Party of North Carolina v. Martin,* 980 F.2d 943 (4th Cir. 1992) (hereinafter *RPNC*) which held that the long term failure to elect candidates in statewide elections when the candidates would have been successful in districts is evidence of a *prima facie* case of *Bandemer*-type political discrimination.

Suits involving Voting Rights Act violations are uniquely unsuitable for summary disposition because "a totality of the circumstances test" must be applied. It is illogical and contradictory to hold that a case requiring a "totality of the circumstances" analysis can be decided in a "summary proceeding" once a *prima facie* case is established. Summary disposition is particularly inappropriate where Petitioners have met the *Gingles* standard and have shown the presence of other Senate factors. *Solomon v. Liberty County,* 899 F.2d 1018 (11th Cir. 1990) *cert. den.* _____ U.S. _____, 112 L. Ed. 2d 663, 111 S. Ct. 670 (1991). The resolution of complex questions of law frequently requires a more concrete factual development than may be obtained through summary proceedings. Wright, Miller & Kane, *Federal Practice and Procedure:* Civil 2d Sec. 2725, at 85-88.

The Seventh Circuit's decision upholds the grant of summary judgment when substantial issues of material facts remain and conflicts with *Celotex; Anderson v. Liberty Lobby*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 205 (1986); and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1970).

Summary judgment is only authorized when the evidence is subject to no alternative reasonable conclusion. The lower court concedes there is uncertainty in the voter motivation yet relies upon it in upholding the granting of summary judgment.

The Seventh Circuit's decision is in open conflict with *Gingles* by failing to engage in a district specific, or "standard, practice or procedure" specific analysis of the challenged election practice as required by the Voting Rights Act, 42 U.S.C. 1973(a) and *Gingles*. No reported decision supports a departure from the *Gingles* "district specific" analysis. The Act protects Petitioners from a system of at-large voting which, when tested by the principles enumerated in *Gingles*, gives them "less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of their choice" from the at-large district. *Collins v. City of Norfolk*, 883 F.2d 1232, 1243 (4th Cir. 1989).

Under *Gingles* the "right" question to ask is "Do African-Americans in Indianapolis have an equally effective opportunity to participate in the political process by electing at-large councilors?" *Gingles*, at 43-44 (quoting S.Rep. No. 417 at 2, 15-16, 27, 28, 36) (footnotes omitted).

The question asked by the Seventh Circuit, "Is there currently racial proportionality on the Council?" is the wrong question and is in conflict with *RPNC*, cited

above, which held "[w]e read the phrase 'the political process as a whole' (citation omitted) to peak to the alleged unconstitutional effects of the *challenged* electoral scheme on the relevant political sphere." Thus the *RPNC* Court correctly confined its "analysis to evaluation of the claimed effect of the method of electing superior court judges on the political process of election of superior court judges . . ." at 956, fn. 24. In other words—a "practice-specific" analysis.

The Seventh Circuit draws an incorrect factual conclusion in holding that "current racial proportionality on the Council" is the equivalent to *Gingles* "persistent proportional representation" from the particular district being challenged, at 77. "Current proportionality" is distinctly different from either the "persistent proportional representation" embraced by Justice Brennan, joined by Justice White, *Gingles* at 77, or "consistent and virtually proportional minority electoral success" as enunciated by Justice O'Connor, joined by Burger, *C.J.*, Powell and Rhenquist, *JJ.*, *Gingles* at 104-105.

The following chart of the facts demonstrates the complete lack of historical evidence of "sustained success" over the years prior to this litigation:

Year	Actual African-American Seats	Number of African-Americans district seats but for racial packing	Number of at-larges Americans could have elected	Seats deprived of due to packing, cracking and at-large	Under-representation
1971	4	6	1	3	43%
1975	4	6	1	3	43%
1979	4	6	1	3	43%
1983	4	7	1	4	50%
1987	4	7	1	4	50%
Totals:	20	32	5	17	46%

Congress, by amending Section 2, indicated concern not only with overt prohibitions against voting, but also with schemes that effectively cancel out or minimize minority voting strength. *See*, S.Rep. at 6. The *effect* of electing councilors at-large is the same as the effect of poll taxes: disenfranchisement of the African-American voter when it comes to electing at-large councilors. Thus preventing any African-American supported officeholder from speaking for African-Americans from a county wide seat. Now the only councilors who can publicly claim to represent the entire county are those elected by, and beholden to, the racially polarized white majority.[11]

The Seventh Circuit mistakenly interprets 42 U.S.C. 1973(b) to create "current racial proportionality" as a "complete defense," by adding an additional element

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[11] Until very recently, the at-larges councilors have held special voting rights that were not available to all councilors. This included the right to sit on Special Service District Councils. *See* I.C. 36-3-4-5. These powers, first granted in 1969 as part of the city-county reorganization, permitted any councilor whose district encompassed "any part of a Special Service District" to sit on the Special Service District Council. All At-large councilors were eligible. *See*, Indiana Acts 1969, C. 173, as 102, 405. In 1971 district councilors from districts with 50% or more of its population within the Special Service District, were permitted to sit on the Special Service District Council. At-large councilors were to sit on the Special Service District Council if 60% of the population of the entire county lived in the Special Service District. If less than 60% of the county population lived in the Special Service District, at-large councilors could no longer sit on the Special Service District Council. *See*, Indiana Acts 1971, P.L. 258, Sec. 1. In 1980, the 60% population requirement was deleted and at-large councilors were permitted to serve regardless. *See*, Indiana Acts 1980, P.L. 213, Sec. 3. In 1983, the 50% population requirement for single-member district councilors was dropped. *See*, Indiana Acts 1983, P.L. 346, Sec. 1. Now all councilors may sit on a Special Service District Council even though the taxes it may impose only affects the predominately African-American part of Indianapolis. For the motives behind these changes see Affidavit of Rozelle Boyd (A50-60).

which plaintiffs must prove in a voting rights act case: the element of non-proportionality on the council which the at-large district elects to. Failure to prove current "non-proportionality" becomes, in the lower court's hands, case-dispositive. The Senate Report makes clear that "(t)he failure of Plaintiff to establish any particular factor, is not rebuttal evidence of non-dilution." S.Rep. 417 at 29 n.118, 1982 U.S.C.C.A.N. at 207 n.118.

" [N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. 1973(b). The lower court misinterpreted this provision to mean that the Voting Rights Act forbids removing barriers to election, such as poll taxes, literacy tests and at-large districts, if removing that barrier would mean that a protected class may elect candidates to a legislative body in numbers greater than their proportion in the population.

The provisions of 42 U.S.C. 1973(b) are more correctly construed to mean that "proportionality" is not case-dispositive unless it has been present in the district over a long period of time. The lower court's method for calculating "racial proportionality" is self-contradictory and flawed. It determines the number of "black seats" by counting only the black population. It determines the number of "white seats" by counting all whites, including those who voted for black, or black-supported, candidates. The method thus "slants" the count in favor of the racially-polarized whites. This unfairness highlights the doctrinal infirmity of "race-counting" and "race quotas" which Congress sought to avoid by adopting the non-proportionality language of 42 U.S.C. 1973(b).

The absurdity, and doctrinal infirmity, of performing such calculations to determine whether a particular electoral device has a discriminatory effect demonstrates the error of the lower court's reliance on a single-variable, simplistic, "brightline", number-based "race proportionality" or "racial quota" basis for deciding a case for which statute, and case law, require a "totality of the circumstances" analysis.

The lower court's addition of an additional standard, *viz.*, that Petitioners must prove a "lack of present racial proportionality" on the council being elected to, in order to avoid summary judgment, conflicts with *Valladolid v. City of National City*, 976 F.2d 1293 (9th Cir. 1992). In *Baird* Petitioners established that candidates of choice of African-Americans have no possibility of winning whereas in *Valladolid*, the plaintiffs failed to present any proof "that their preferred candidates usually lost." at 1296.

Only "sustained" or "persistent proportional representation" from the particular district being challenged may, under certain circumstances defeat a Section 2 challenge. 478 U.S. at 77. The "extent to which members of a protected class *have been* elected to office . . . is *one* circumstance which may be considered." *Id.* at 75 (emphasis added). Even the prior election of a few protected class supported candidates in the specific district being challenged does not foreclose a Section 2 challenge *as a matter of law*. The Seventh Circuit has adopted the position, put forward by the *Gingles* appellants, that "proportional or nearly proportional representation in a single election . . . alone precludes, as a matter of law, finding a Section 2 violation." *Gingles* at 62 (J. O'Connor concurring). However *Gingles* rejected this proposition.

As Justice O'Connor observed, an "at-large ... district has an inherent tendency to submerge the votes of the minority," and electing councilors at-large "cancels out and minimizes" the voting strength of minorities. *Gingles*, at 87 (J. O'Connor, concurring). The lower court decision transfigures this "inherent tendency" into the actuality of a pernicious and discriminatory "effect" which will be present in most major metropolitan communities where a minority is numerous enough, and segregated enough, to elect a candidate if the at-large districts were to be made single-member districts. Indeed, the example given in Justice O'Connor's concurrence of electing all candidates from an at-large district illuminates the *Baird* situation because "(u)nder this scheme, white voters could elect all the representatives (from the at-large district) even if black voters turned out in large numbers and voted for one and only one candidate." *Gingles* at 86 (J. O'Connor concurring). This is vote dilution. Even assuming that a "geographical overlap" exception is sensible within a district specific analysis under *Gingles*, there has not been the sustained proportional representation also required by *Gingles*. The "geographical overlap" exception is, by its very terms, inconsistent with a district specific analysis because it focuses on an "area" rather than an election practice.

The lower Court's reasoning *will always permit* a racially polarized white majority to reduce the impact of coalition voting by increasing *pro rata* the number of at-large seats to maintain absolute or near-absolute racial proportionality. Black gains in districts can always be neutralized back down to proportionality by increasing

the number of seats elected from the at-large district. *Baird* is thus also in conflict with *Whitfield v. Democratic Party of State of Arkansas*, 890 F.2d 1423 (8th Cir. 1989) *aff'd en banc*, 902 F.2d 15, *cert. den.*, 112 L. Ed. 2d 1193 (1990) in that it can be concluded that the clear purpose of the white majority on the Council in retaining the at-large district was to *cancel* the impact of the increase of the black vote in the districts caused by this litigation. The Seventh Circuit recognized as much when it stated, "(I)t cannot be surprising that the party with political control opposes a plan that would ensure the loss of at least one of these four seats."(A7).

"Section 2 ... is violated whenever the voting strength of a traditionally disadvantaged racial group is diluted." *Whitfield* at 1428. If occasional success in "the challenged districts" is not case "dispositive," then certainly very recent success in non-challenged districts cannot be dispositive. *Gingles*, at 95 (J. O'Connor, concurring). The lower court's interpretation, and transmogrification of this "no cause of action" provision into a "complete defense" is unwarranted either by language of the statute, the legislative history or caselaw authority.

Baird is also at odds with the holding in *Concerned Citizens v. Hardee County Bd.*, 906 F.2d 524, 526 (11th Cir. 1990) because proof of factors, other than establishing the *Gingles* criteria, is not essential to a Section 2 claim. The *Baird* decision imposes an additional criteria upon Plaintiffs by requiring them to prove lack of proportional representation in elections from districts other than the one being challenged.

This "defense" to liability is a "judicially created limitation which restricts coverage under Section 2" and is at odds with *Chisom v. Roemer*, 501 U.S. _____, 111

S. Ct. 2354, 2368, 115 L. Ed. 2d 348 (1991). *See, also, Emison v. Growe*, 782 F. Supp 427 (D. Minn. 1992) *prob. juris. noted* 503 U.S. _____, 118 L. Ed. 2d 206, 112 S. Ct. 1557 (1992) *rev'd and remanded with instructions* February 23, 1993, 1993 WL 42842.

The Seventh Circuit failed to perform a sufficiently detailed "totality of the circumstances" analysis as required by *Gingles*. Every "alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Simms*, 377 U.S. 533, 562, 84 S. Ct. 1362, 1381, 12 L. Ed. 2d 506 (1964). The Voting Rights Act is "interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom*, at 2368 quoting *Allen v. State Board of Elections*, 393 U.S. 544, 567, 89 S. Ct. 817, 832, 22 L. Ed. 2d 1 (1969). The lower court's one-dimensional examination fails to comprehensively analyze the conditions African-Americans have faced in Indianapolis which has been more discriminatory than African-Americans in Minneapolis as described in *Emison v. Growe*, cited above.

The Seventh Circuit's "totality of the circumstances" analysis consists of an unvarnished and simplistic counting, by race, of the makeup of the Council. It evidences the lower court's failure to perform a "functional" analysis of the political process by a "searching practical evaluation of the past and present reality". *Gingles*, at 62-63. The lower court's failure is evidenced by the lack of any discussion of the Senate factors or the fact of the consent decree. This reliance on a single fact goes against Congressional and Supreme Court instruction to conduct a detailed examination and warrants reversal. The failure to engage in a "totality of the circumstances" analysis is particularly egregious in that the lower court fails to

identify a legitimate governmental reason to maintain the existing system. *Houston Lawyers Association v. Attorney General of Texas*, 501 U.S. _____, 115 L. Ed. 2d 379, 111 S. Ct. 2376, 2381 (1991).

Implicit in the Seventh Circuit's failure to engage in an adequate "totality of the circumstances" analysis is that it drastically, and unfairly, overvalues recent court-ordered remedial efforts which were the cause in fact of the "current racial proportionality" in the makeup of the council. *Gingles* holds that a district court may and should "take account of the circumstances surrounding recent black electoral success in deciding its significance," *Id.* at 76. The lower court's failure to discuss that the end of single-member district discrimination came about as a result of this litigation indicates that the lower court gave this factor insignificant weight. The "present racial proportionality" on the council and the "present racial proportionality" in the makeup of the council came about as the result of a consent decree which partially settled the instant litigation.[12]

One of the lower Court's fundamental errors is its holding that a protected classes' anticipated *future* electoral success, in single member districts adopted to partially settle their instant claims, has greater

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[12] The trial court appears to have followed the procedure outlined in *Scott v. Germano*, 381 U.S. 407, 85 S. Ct. 1525, 14 L. Ed. 2d 477 (1965) by permitting, via the consent decree, the Council to first attempt to redistrict and cure the violations both in the single-member districts and in the at-large, but failed to follow the instruction that a court approved plan should prefer single-member districts over multimember districts, absent persuasive justification to the contrary. *Wise v. Lipscomb*, 437 U.S. 535, 540-541, 57 L. Ed. 2d 411, 98 S. Ct. 2493 (1978); *Connor v. Finch*, 431 U.S. 407, 415, 52 L. Ed. 2d 465, 97 S. Ct. 1828 (1977).

evidentiary weight than the complete absence of a protected classes' electoral success in all prior at-large elections held under the challenged procedure. The Seventh Circuit raises one "circumstance" of post-filing evidence consisting of a single fact (*viz.*, present "racial proportionality" on the Council) into a talismanic and absolute "defense" to an at-large district which admittedly fails under present *Gingles* standards.

Lower courts need direction from this Court on what the essential elements of a Section 2 claim are; what evidence prevents granting summary judgment and what the proper standards for granting summary judgment in a Section 2 case are.

CONCLUSION

For these various reasons, this petition for certiorari should be granted, a full briefing of the issues ordered, the opinion of the Circuit Court reversed and for all other proper relief.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Decided September 30, 1992)

[Reported at 976 F.2d 357]

In the

United States Court of Appeals

For the Seventh Circuit

No. 91-3700

DAVID BAIRD, *et al.*,

Plaintiffs-Appellants,

v.

THE CONSOLIDATED CITY OF INDIANAPOLIS, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. IP87-111C—**Sarah Evans Barker**, *Judge.*

ARGUED MAY 20, 1992—DECIDED SEPTEMBER 30, 1992

Before CUDAHY and EASTERBROOK, *Circuit Judges*, and WOOD, JR., *Senior Circuit Judge.*

EASTERBROOK, *Circuit Judge.* There are 29 seats in the City-County Council of Marion County in Indiana, a consolidated government comprising metropolitan Indianapolis. State law requires Marion County to elect 25 persons from single-member districts and the other 4 at large. Ind. Code §§ 36-3-4-2(a), 36-3-4-3(b). Until recently only four of the single-member districts (13.8% of the 29 seats) had majorities of black voters, although 21.28% of the county's population (and 19.28% of its voting-age population) is black. Five registered black voters in Marion County (three of whom sit on the Council) filed this suit

in 1987 under the Voting Rights Act, contending that both "packing" minorities into 4 districts and electing 4 seats at large undermined the influence of black voters. In 1991 the Council adopted a new plan establishing 7 districts in which the black population approximates 60%. Plaintiffs conceded that these single-member districts comply with the Voting Rights Act, because they give black voters dominating influence over 28% of the single-seat districts and 24.14% of all 29 seats. No greater number of minority-dominated districts could have been created, according to data from the 1990 census. Candidates favored by black voters carried all 7 districts in the 1991 elections. Nonetheless the plaintiffs contend that the 4 at-large seats violate §2 of the Voting Rights Act, 42 U.S.C. §1973, because it is possible to draw 4 large single-member districts in such a way that blacks would make up a majority in 1. Maintaining multi-member districts when minorities could do better with single-member districts, plaintiffs contend, violates §2 even if the plan as a whole ensures proportional representation for black voters. The district court disagreed, granting summary judgment for the defendants.

Section 2(a) of the Voting Rights Act makes it illegal to deny or abridge, on account of race, any person's right to vote. Section 2(b), as amended in 1982, adds that a violation of §2(a) occurs

> if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 2(b) grew out of a fierce political fight and bears the marks of compromise. Congress wanted to define violations in terms of outcome, not intent, and in so doing to reject the view taken by a plurality in *Mobile v. Bolden*, 446 U.S. 55 (1980), that §2 required a showing of racially discriminatory intent. See *Thornburg v. Gingles*, 478 U.S. 30, 71 (1986); *McNeil v. Springfield Park District*, 851 F.2d 937, 940 (7th Cir. 1988); *Ketchum v. Byrne*, 740 F.2d 1398, 1403 (7th Cir. 1984). But an unvarnished "results" approach can be satisfied only by proportional representation, which would offend the norm that the electoral process ensures equality of opportunity and not equality of outcome. If specified groups are entitled to "their" members in the legislature, why bother with elections? (Minorities may disagree among themselves, but then why not elections in which only members of the specified groups can vote, after the fashion of elections among registered members of Indian tribes?) Concern about the potential for subversion of universal suffrage, coupled with the substantial support in Congress for retaining *Bolden*, produced both the phrasing of §2(b) requiring equal rights of "participation" (inputs rather than outputs) and the proviso disclaiming entitlement to proportional representation.

Any compromise that seeks to have things both ways, as this one did, produces nightmares in implementation. The Justices divided three ways in *Gingles* on the interpretation of the language. Justice Brennan, writing for a majority in this respect, concluded that plaintiffs seeking to attack a multi-member district must show at least that the minority group is sufficiently large to make up a majority in a single-member district, that the minority is politically cohesive, and that the majority usually votes as a bloc to defeat the minority's preferred candidate. 478 U.S. at 50-51. Plaintiffs contend, and we assume, that they can prove these things. Proof along these lines is not enough, however, if other considerations show that the minority has an undiminished right to participate in the political process. The district judge concluded that black voters' strength in seven districts is such a consideration.

If these voters are politically cohesive, they will elect candidates of their choice and obtain representation in the Council exceeding their numbers in the electorate; and if they are not cohesive, they cannot satisfy the requirements for relief under *Gingles*.

Plaintiffs challenge the district court's use of their predicted (now, actual) success. We agree with them that proportional representation does not automatically defeat claims under the Voting Rights Act—not only because Justice Brennan's opinion says so, 478 U.S. at 74-76, but also because the statute gives *each* person the right to political participation. Congress did not disagree with *Bolden* to the extent it held that intentional discrimination violates both the Act and the Constitution. Having drawn seven districts with secure black majorities, Marion County could not prevent black citizens from voting in the election for the four at-large seats or otherwise discriminate against any class of citizens. A balanced bottom line does not foreclose proof of discrimination along the way. *Connecticut v. Teal*, 457 U.S. 440 (1982). Just as the proviso to §2(b) ensures that white candidates are free to compete for electoral success that exceeds the ratio of white voters, so blacks must be free to compete for favor; the Voting Rights Act neither sets nor tolerates a cap on their achievements.

Nothing in this record suggests intentional discrimination against black persons, however, and plaintiffs therefore pin their hopes on the outcome approach of §2(b). Any approach that depends on outcomes supposes the need to consider multiple electoral contests—the same position over many years, many positions during the same year, or both. States attempt to comply with the Voting Rights Act by creating conditions conducive to success by minorities throughout the jurisdiction as a whole. E.g., *Prosser v. Election Board*, 793 F. Supp. 854 (W.D. Wis. 1992) (three-judge court). That it why it does not violate the Act to have some districts in which black voters form a minority and are unlikely to elect candidates of their choice, *Gomez v. Watsonville*, 863 F.2d 1407, 1414 (9th Cir. 1988); *Campos v. Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988),

any more than it violates the Act to have districts (such as the seven black-majority districts in Marion County) in which white voters are unlikely to be influential at the polls. See *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977). Considerations of this kind persuaded the district court to measure black voters' likely success by reference to all 29 seats rather than just the 4 at-large seats.

Aggregation, according to plaintiffs, offends the majority's statement in *Gingles* that "[t]he inquiry into the existence of vote dilution caused by submergence in a multimember district is district specific." 478 U.S. at 59 n.28. See also *id.* at 101 (O'Connor, J., concurring in judgment) ("racial voting statistics from one district are ordinarily irrelevant in assessing the totality of the circumstances in another district"). Yet the Justices cannot have meant to *foreclose* examination of electoral patterns in multiple districts—for it is only by looking across multiple districts and elections that we can see patterns of success or failure. See, e.g., *McGhee v. Granville County*, 860 F.2d 110, 118-19 & n.9 (4th Cir. 1988). Every plan that has ever been devised to comply with the statute measures opportunities for electoral success across multiple seats. Section 2(b) expressly requires a court to consider the "totality of circumstances". Cf. *Board of Estimate v. Morris*, 489 U.S. 688, 701 & n.8 (1989) (district and at-large representatives must be considered together in determining constitutionality of apportionment scheme). All of the Justices in *Gingles* considered how black candidates fared in multiple elections spread over many districts and many years. References in *Gingles* to district-specific inquiries assume that each multi-member district spans a different part of the state, with different minority populations and, perhaps, different cohesiveness of majority and minority voters. The Court did not consider how to apply §2(b) to a jurisdiction that, like New York City (the subject of *Morris*), contains overlapping single- and multi-member districts. The district court did not err in taking the 25 single-member districts into account in assessing plaintiffs'

contention that Marion County diluted the political strength of black citizens.

Section 2(b) says that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. §1973(b). This means at least that a minority cannot win by proving that it is underrepresented, then resting. *Gingles*, 478 U.S. at 46 ("the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation"); *McGhee*, 860 F.2d at 119-20. All questions of intentional discrimination to one side, §2(b) also implies that blacks who have influence proportional to their numbers do not state a claim under §2(a). Recall what an "outcomes" approach means: it is an opportunity to show what would be called in employment cases a "disparate impact." Unless black voters fare poorly compared with white voters in achieving their objectives (the election of the candidates they prefer), they have not stated a claim *under §2(b)*, although proof of intentional discrimination under §2(a) remains an option.

Six Justices in *Gingles* reached this conclusion. These six agreed that at-large elections in House District 23 did not violate the Voting Rights Act because "the last six elections have resulted in proportional representation for black residents." 478 U.S. at 77. Justices Stevens (joined by Marshall & Blackmun, JJ.), dissented from this part of the judgment, *id.* at 106-08, but the four Justices who disagreed with Justice Brennan's statement of legal principles agreed with his conclusion concerning District 23. *Id.* at 103-05 (O'Connor, J., joined by Burger, C.J., and Powell & Rehnquist, JJ.). One thing that separated Justice Brennan from Justice O'Connor was the weight to be accorded to minority candidates' success over short periods. Justice Brennan wrote that "[w]here multimember districting generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters." 478 U.S. at 76. On

this score he had the support of Justices Marshall, Blackmun, and Stevens. The majority was concerned that black electoral success might be attributable to transient factors such as the pendency of litigation that could lead white voters to throw the minority a bone. See also *Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973), affirmed under the name *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976). But Justices Brennan and White (joined by those who signed Justice O'Connor's opinion) went on to hold that "*sustained* success" (emphasis in original) in District 23 negated any claim under §2(b). 478 U.S. at 77. Justices Brennan and White held open the possibility that in some situations "such sustained success does not accurately reflect the minority group's ability to elect its preferred representatives", *ibid.*, but declined to say under what circumstances that might be so.

The outcome of the 1991 elections in Marion County is not the "mere loss of an occasional election". 478 U.S. at 51. Plaintiffs acknowledge that black voters are no longer "packed" and will control the outcome in 7 of the 25 districts so long as they remain cohesive. Thus we cannot accept plaintiffs' effort to portray the district court's analysis as based only on "prospective proportionality."

Marion County illustrates Justice White's observation, 478 U.S. at 83, that losses by the candidates black voters prefer may have more to do with politics than with race. Marion County is a Republican stronghold. The Republican mayoral candidate won with 56% of the vote in 1991, and his party achieved an 18-11 majority on the Council. All four of the at-large slots went to Republicans (and by comfortable margins). It cannot be surprising that the party with political control opposes a plan that would ensure the loss of at least one of these four seats. Section 2 of the Voting Rights Act forbids the "denial or abridgment of the right . . . to vote on account of race or color". It is a balm for racial minorities, not political ones—even though the two often coincide. *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971) (a case involving Marion County, Indiana).

Voters in Marion County seem to prefer Republicans but do not necessarily judge their Republicans by color. One of the four victors in the at-large contests of 1991 is black. Plaintiffs scoff, insisting a Republican cannot be a "representative of choice" of a black population that prefers Democrats. Justice Brennan contended in *Gingles* that in determining whether a governmental body has violated §2(b) a court should disregard the race of the persons elected and ask only whether the minority voters were able to elect the candidates they favored. 478 U.S. at 67-68. Justice White disagreed with this conclusion (which therefore did not achieve the support of a majority), observing that a system leading to the election of black Republicans could not be dismissed as discriminatory. To disregard the race of the victors, Justice White concluded, "is interest-group politics rather than a rule hedging against racial discrimination." 478 U.S. at 83 (White, J., concurring). Justice O'Connor agreed with Justice White. 478 U.S. at 101 (O'Connor, J., concurring in judgment). The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates.

Notwithstanding their disclaimers, plaintiffs want a rule barring at-large seats whenever there is a cohesive minority and smaller districts can be drawn to increase that minority's success. But the Court has held that at-large districts are not invariably forbidden, under either the statute or the fifteenth amendment. *Rogers v. Lodge*, 458 U.S. 613, 616-17 (1982); *White v. Regester*, 412 U.S. 755, 765 (1973); *Fortson v. Dorsey*, 379 U.S. 433 (1965). *Gingles* rejected any notion that at-large seats are always illegal under the Voting Rights Act: "[E]lectoral devices, such as at-large elections, may not be considered *per se* violative of §2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process." 478 U.S. at 46. The "totality of the circumstances" in this case guarantee black voters control over at least seven seats on the Council.

The voters of Marion County may give them more, but that success must come at the ballot box.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

OPINION AND JUDGMENT ENTRY OF THE DISTRICT COURT FOR SOUTHERN DISTRICT OF INDIANA GRANTING SUMMARY JUDGMENT

(Dated October 23, 1991)

IP87-111C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DAVID BAIRD, ROZELLE BOYD, WILLIAM D. CRAWFORD, GLENN HOWARD, and PAUL JONES,
Plaintiffs,

vs.

THE CONSOLIDATED CITY OF INDIANAPOLIS, *et al.*,
Defendants.

JUDGMENT

In accordance with the court's entry of this date, judgment is hereby entered in favor of the defendants and against the plaintiffs on the defendants' motion for summary judgment.

It is so ORDERED this 23rd day of October, 1991.

/s/ SARAH EVANS BARKER
Sarah Evans Barker, *Judge*
United States District Court
Southern District of Indiana

IP87-111C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DAVID BAIRD, ROZELLE BOYD, WILLIAM D. CRAWFORD, GLENN HOWARD, and PAUL JONES,
Plaintiffs,

vs.

THE CONSOLIDATED CITY OF INDIANAPOLIS, *et al.*,
Defendants.

ENTRY

This matter comes before the court on the defendants' motion for summary judgment. In this lawsuit, the plaintiffs seek both injunctive relief and a declaratory judgment that the at-large election of four seats on the Marion County City-County Council ("the Council") violates the Voting Rights Act of 1965, as amended, 42 U.S.C. §1971 et seq. The plaintiffs do not challenge the current redistricting scheme itself, contained in General Ordinance No. 36, 1991, as they agree that it "meets the minimal requirements of Section 2 of the Voting Rights Act, 42 U.S.C. §1973, by creating seven (7) majority black districts, both the maximum and the minimum number of black majority districts which can be created in a twenty-five (25) seat redistricting plan. . . ." Amended Complaint, para. 6. Instead, the

plaintiffs have focused their challenge on the four at-large seats. The factual and procedural background of this case is described in greater detail in this court's entry of April 25, 1991.

On that date, the court, after hearing, denied the plaintiffs' motion for preliminary injunction, concluding in part that "the plaintiffs have not established a likelihood of success on the merits. . . ." Entry of April 25th, p. 25. The court hereby incorporates the April 25th entry. The defendants' motion for summary judgment in effect gave the plaintiffs an opportunity to address this court's analysis in its response to the defendants' motion for summary judgment. Since no genuine issues of material fact exist, and since the court concludes that the defendants are entitled to judgment in their favor as a matter of law, the defendants' motion for summary judgment is granted.

The plaintiffs have admitted (and at the April 17, 1991 hearing provided Dr. Gordon Henderson's expert testimony) that the current representation scheme will provide seven black majority seats, constituting approximately 24.14% of the total of 29 Council seats (which includes the four at-larges), and that the total African American population of Marion County is slightly above 21% of the total population. In light of these admissions, two basic conclusions served as the underpinning for the court's April 25th decision that the plaintiffs had not established a likelihood of success on the merits. The first was the ruling that all the representatives to the Council must be considered in assessing the plaintiffs' challenge to the four at-large seats. The second was the conclusion that the proportional representation of African Americans on the Council satisfied the Section 2 requirement that they have equal access to the political process. The court will re-examine each of these conclusions in turn.

The defendants cite *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), and *Dickinson v. Indiana State Election Board*, No. IP90-200-C, (S.D. Ind. May 17, 1990), for the proposition that an inquiry into the question of whether at-large districts violate Section 2 must be conducted on a district-specific level. This same argument was advanced by the plaintiffs in support of the motion for preliminary injunction without any response being given to the court's resolution of the issue.

The court responded to this argument by noting that the district or constituency represented by the four at-larges comprises all of Marion County, as there are no geographic subdivisions among the four seats. *See* Entry of April 25th, pp. 18-20. Unlike both *Thornburg* and *Dickinson*, which involved geographically distinct districts and constituencies, the four at-larges in this case overlap the entire county, which is also represented by twenty-five individuals from single-member districts. The concern that proportional representation for minority constituents in one district not be used to excuse less than equal participation for a different group of constituents in another district is thus not present here. Using the "totality of the circumstances" approach commanded by Section 2 of the Voting Rights Act, the court when examining the effect of the at-larges cannot ignore the twenty-five other representatives in Marion County in assessing whether African Americans in Marion County "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Voting Rights Act, §2(b), 42 U.S.C. §1973(b).

The plaintiffs next argue that even if the court were to consider all the representatives to the Council, "there is no historical evidence of proportional representation of

African-Americans in previous districting plans, even considered as a whole." Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment ("Plaintiffs' Brief"), p. 6. The plaintiffs support this contention with the testimony of their expert who testified at the preliminary injunction hearing, Dr. Gordon Henderson. What they fail to mention in this regard is that Dr. Henderson testified at the hearing that both the proposed redistricting plan submitted by the plaintiffs and the one enacted by the Council, which is the one being considered by this court, provided for seven black majority seats, or 24.14% of the total Council seats, where the African American population in Marion County represented 21.28% of the total.

The issue thus arises of whether proportionality of representation is a defense to an action brought under Section 2 of the Voting Rights Act. This court has previously answered that question in the affirmative, and the plaintiffs have offered no arguments which persuade the court that its earlier conclusion was improper.

The plaintiffs, while agreeing that *Thornburg* recognized that persistent proportionality of representation could be a defense to some Section 2 claims, argue that such a defense is not available here because, in contrast to the district in *Thornburg* where the Section 2 challenge failed in light of persistent successes for the candidates of choice of the minorities, there is no such history of sustained successes for at-large candidates in Marion County. Plaintiffs' Brief, pp. 8-10. The difference between this case and *Thornburg*, however, is that here the plaintiffs have conceded that the current redistricting scheme will provide seven black majority seats on the Council,[1] whereas in *Thornburg*

[1] *See, e.g.*, Plaintiffs' Brief, p.2.

there was no such concession, and historical evidence was all that the Supreme Court had upon which to rely. Just as "persistent proportional representation [was] inconsistent with [the] allegation that the ability of black voters . . . to elect representatives of their choice [was] not equal to that enjoyed by the white majority" in *Thornburg*, 478 U.S. at 77, 106 S.Ct. at 2780, so here an admission that the current redistricting scheme provides for proportional representation is inconsistent with the allegation that the scheme deprives African Americans of an equal opportunity to participate in the political process and to elect candidates of their choice.

In footnote four on pages eight and nine of the Plaintiffs' Brief, the plaintiffs contend that the defendants never made clear whether they considered proportionality a defense to a finding of liability or merely a factor to be considered by the court at the remedial stage. If the defendants' position was not clear (and the court thinks it was), then at least the court's April 25th entry should have been clear to the plaintiffs. In concluding that the plaintiffs had not demonstrated a likelihood of success, the court was dealing with the question of whether the plaintiffs were likely to establish that the defendants were liable for a Section 2 violation. The plaintiffs offer no arguments or authority in support of their position that the issue of proportionality should not be reached until the remedial stage, and as the defendants noted, a finding of liability was reversed in *Thornburg*, 478 U.S. at 77, 106 S.Ct. at 2780, on the basis of a finding that proportional representation had been achieved. Accordingly, the court sees no reason to treat proportionality, as raised in this case, as anything other than a defense to liability.

The plaintiffs cite employment law cases in support of their contention that "allowing a defendant in a discrimination case to avoid liability simply by taking remedial measures would subvert and undermine the purposes of federal anti-discrimination laws." Plaintiffs' Brief, p. 13. The plaintiffs have failed to argue that these Title VII cases are sufficiently analogous to a Section 2 case to be useful, and to cast the newly-adopted districting ordinance as a remedial measure is perhaps unwarranted.

In any event, the plaintiffs have presented no evidence or case law to support the idea that a districting scheme may be held to violate Section 2 despite the fact that it provides for proportional representation. It is true that in a standard Section 2 case, where there has been no admission of proportional representation in the future, a history of discrimination has a bearing on the outcome. However, the question of whether there has been a history of discrimination is not asked for the purpose of providing plaintiffs with extra seats on a legislative body, like so many dollars to compensate for damages from tortious conduct. Rather, the inquiry is made because it is relevant, applying a totality of the circumstances test, to determining whether an election practice or procedure deprives the plaintiffs of an opportunity to participate equally in the political process and to elect representatives of their choice. Section 2(b) of the Voting Rights Act provides in part:

> A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination are not equally open to participation by members of a [protected] class . . . in that its members have less

> opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

At issue in Section 2(b) is thus whether processes *are* equally open, and whether they once were not is relevant only towards resolving the issue of their current status. However, where the plaintiffs concede that the current ordinance will provide for proportional representation, they cannot establish a simultaneous violation of Section 2.[2]

The plaintiffs contend that, proportionality aside, they are entitled to focus their challenge to one portion of a plan, and the fact that some aspects are adequate does not excuse those aspects that do not comply with Section 2. The plaintiffs have not, however, suggested that the four at-larges occupy a unique position on the Council, and this court cannot ignore the twenty-five other Council members who are elected from the same county as are the at-larges in assessing, as required by Section 2(b), the "totality of the circumstances."

The plaintiffs advance a hypothetical in support of their contention that proportionality of representation is not a defense. They describe a fictional city with a 60% white population concentrated in districts on the periphery, and the plaintiffs note that it would be contrary to Section 2 to compensate for these highly concentrated white districts by creating an equal number of highly concentrated black districts. The plaintiffs continue, "But under Defendants' argument it would be improper for blacks, being only 40% of the population, to

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[2] Likewise, the proportionality of representation is a defense here to the plaintiffs' claim that a finding of liability under Section 2 might be based on the allegedly tenuous justification for the use of at-large representatives.

control greater than that percentage of seats on the council." Plaintiffs' Brief, p. 16. However, the "[d]efendants do not claim that the legislative body charged with redistricting is not permitted to afford minority voters greater than proportional representation where housing and voting patterns would permit such a result." Defendants' Reply Brief, p. 11 (footnote omitted). Moreover, the court is not here to judge whether the redistricting scheme or the use of at-large representatives is "proper" in some undefined sense. The court is charged with determining whether a violation of Section 2 is present, and as the court noted in its April 25th entry. Section 2 provides neither a ceiling on the number of minority representatives that might be elected nor a tool for providing more than equal representation.[3]

The plaintiffs cite *Connecticut v. Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982), as being fatal to a proportionality defense in a Voting Rights Act case. Interestingly, *Connecticut* was decided prior to *Thornburg*, and the plaintiffs conceded that *Thornburg* "does recognize that under certain very narrowly defined circumstances proportional representation may be asserted as a defense to a §2 claim against a multimember district." Plaintiffs' Brief, p. 8. At issue in *Connecticut*, 457 U.S. at 442, 102 S.Ct. at 2528, was:

> whether an employer sued for a violation of Title VII of the Civil Rights Act of 1964 may assert a 'bottom-line' theory of defense. Under that theory . . . an employer's acts of racial discrimination in promotions . . . would not render the employer liable for the racial discrimination suffered by employees

[3] Indeed, Section 2(b) provides "[t]hat nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

> barred from promotion if the 'bottom-line' result of the promotional process was an appropriate racial balance.

The Court held that a "bottom-line" defense was not available in a Title VII action. *Id.* The plaintiffs rely on *Connecticut* to support their position that the fact that some parts of an electoral scheme might comply with Section 2 does not excuse the existence of those structures that do not comply.

Distinguishing *Connecticut*, the defendants point out that while Section 2 of the Voting Rights Act seeks to protect members of a class, Title VII is designed to protect individual rights. When detailing the conditions for establishing a Section 2 claim that a multimember district impaired the ability of minority voters to elect their candidates of choice, the Supreme Court in *Thornburg*, 478 U.S. at 50-51, 106 S.Ct. at 2766-67, spoke of three showings that would have to be made by a minority group, not an individual. By contrast, in *Connecticut*, 457 U.S. at 453-54, 102 S.Ct. at 2534, the Court noted that "The principal focus of [Title VII] is the protection of the individual employee, rather than the protection of the minority group as a whole." Thus, the fact that a "bottom-line" defense was held inapplicable in the Title VII context does not necessarily preclude a proportionality defense in a Voting Rights Act Section 2 case.[4]

The court therefore remains convinced that the two premises which formed the basis of the April 25th entry remain sound. The first was that all the representatives

[4] Nor does this court understand the proportionality defense asserted by the defendants to mean that adequate representation in one district excuses less than sufficient representation in a separate district. *See supra* pp. 3-4.

to the Council must be considered in assessing the plaintiffs' challenge to the four at-larges. The second was that proportionality of representation could be a defense to a Section 2 action. These premises, when combined with the undisputed facts showing that African Americans in Marion County will have proportional representation on the Council, defeat the plaintiffs' Section 2 claim.

CONCLUSION

In light of the proportional representation scheme provided for in General Ordinance No. 36, 1991, this court finds that the defendants are entitled to judgment as a matter of law on the plaintiffs' Voting Rights Act Section 2 claim. Accordingly, the defendants' motion for summary judgment is granted.

It is so ORDERED this 23rd day of October, 1991.

/s/ SARAH EVANS BARKER
Sarah Evans Barker, *Judge*
United States District Court
Southern District of Indiana

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RULING OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA ON THE MOTION FOR PRELIMINARY INJUNCTION

(Dated April 25, 1991)

IP87-111C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DAVID BAIRD, ROZELLE BOYD, WILLIAM D. CRAWFORD, GLENN HOWARD, and PAUL JONES,
Plaintiffs,

vs.

THE CONSOLIDATED CITY OF INDIANAPOLIS, *et al.*,
Defendants.

ENTRY

This matter comes before the court on the plaintiffs'[1] motion for a preliminary injunction, seeking to enjoin elections (most immediately, the primary election

[1] In the Amended Complaint filed on April 2, 1991, the following individuals were named as plaintiffs: David Baird, Rozelle Boyd, William D. Crawford, Glenn Howard, and Paul Jones. On April 9, 1991, the defendants filed an objection to the plaintiffs' procedural errors in their attempt to amend the complaint which would add David Baird and William D. Crawford and delete other named individuals. Although the defendants' procedural objections are well-taken, the defendants have not made any substantive objection to the amendments. In light of the overriding need to resolve the issues raised by the pending motion in as expeditious a fashion as possible, the court hereby OVERRULES the defendants' objection, and the April 2, 1991 Amended Complaint will be deemed to be brought by the five individuals named as plaintiffs.

scheduled for May 7, 1991) for at-large members of the Marion County City-County Council ("The Council"). An evidentiary hearing was held on this matter on April 17, 1991, and briefs have been submitted by the parties.

I. Procedural Background

The plaintiffs filed their original complaint in this cause on February 6, 1987. Activities in connection with this lawsuit were largely discovery-related until the filing of the plaintiffs' amended complaint on October 26, 1989.

The 1989 Amended Complaint contained ten counts, all challenging the Council districting scheme which was then in effect. The plaintiffs charged that the districting scheme violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by violating the one person, one vote standard. They also alleged specifically that black and Democratic voters in Marion County were denied equal protection of the laws. Furthermore, the districting scheme and the provision for four at-large seats were challenged as violating the Voting Rights Act of 1965, as amended, 42 U.S.C. §1971 *et seq.*, as well as various provisions of Indiana statutory and constitutional law.

Numerous summary judgment motions were filed, as well as various other motions and responses. The need for a judicial ruling on these matters was obviated when the parties entered into a consent decree, signed by this court on September 25, 1990. The consent decree provided, among other things, that a redistricting, based upon 1990 census data, would occur prior to the next Council primary election, scheduled for May, 1991. The plaintiffs reserved a right to raise in an amended complaint any challenges to the new districting scheme which they might have.

Following the release of the 1990 census data, a number of proposed redistricting plans were submitted for consideration to the Council by various groups and individuals. At least two public hearings were held on the proposed redistricting schemes before the Rules and Policy Committee of the Council. The ordinance presently at issue, General Ordinance No. 36, 1991 ("the Ordinance"), was adopted by the council on March 25, 1991, and signed by Mayor William Hudnut III on March 26, 1991. A certified copy of the Ordinance accompanied by a map were submitted to the court pursuant to the schedule set by the court in its Pretrial Entry and Order signed by this court on February 25, 1991.

II. The Parties' Contentions

The plaintiffs (now partially reconstituted from the original group) filed their amended complaint on April 2, 1991. The amended complaint alleges that the plaintiffs are African American citizens of Marion County who seek both declaratory and injunctive relief to enforce Section 2 of the Voting Rights Act of 1965, as amended ("Voting Rights Act"), 42 U.S.C. §1973. As noted in the complaint, on February 4, 1991, the Council adopted the recommendation of the Council's Rules and Policy Committee that the Council retain without modification the four at-large seats on the Council and the manner of voting for them. In addition to the four at-large seats, the Council's newly-adopted redistricting Ordinance provides for twenty-five district representatives. State law requires that the Council be comprised of representatives from twenty-five single-member districts plus four members elected at-large. IC 36-3-4-3(b).

The plaintiffs do not challenge the new redistricting scheme itself, as they agree that the Ordinance "meets the minimal requirements of Section 2 of the Voting Rights Act, 42 U.S.C. §1973, by creating seven (7) majority black districts, both the maximum and the minimum number of black majority districts which can be created in a twenty-five (25) seat redistricting plan. . . ." Amended Complaint, para. 6. However, the plaintiffs do take issue with the retention of the four at-large seats. These seats, they allege, have existed and been filled in each of the prior five Council elections since the adoption of Unigov, an enactment which consolidated the political subdivisions of Marion County into a single government, by the Indiana General Assembly in 1969. There has never been and is not currently any subdistrict residency requirement with respect to these four at-large seats.

The plaintiffs further allege that the African American population of Marion County, generally concentrated in Center, Wayne, Pike, Washington, Lawrence and Warren Townships, is slightly more than 21% of the total population of Marion County. Furthermore, the plaintiffs claim that African Americans in Marion County vote cohesively and as a bloc for Democratic candidates, and that their influence on the Council is diluted by the use of the four at-large representatives. They contend that no candidate of choice of African American voters has ever been elected to an at-large Council seat, and that no such candidate of choice will be elected because the white majority in Marion County votes sufficiently as a bloc to defeat the candidates of choice of the African American voters. Voting in Marion County is alleged to be racially polarized. The plaintiffs thus contend that the decision to

continue the use of the four at-large seats means that African American voters will continue to have less of an opportunity to participate in the electoral process.

The plaintiffs also allege in the amended complaint that the history of official discrimination in Indiana as a whole and in Marion County in particular hinders the ability of the black population to register, to vote, and to participate in the political process. In addition, they contend that African Americans in Marion County bear the effects of discrimination, such as is seen in segregated housing, higher black unemployment, disproportionate poverty in the black population, a lower per capita income than that of whites, and one of the highest black infant mortality rates in the nation. The effects of this discrimination, the plaintiffs charge, also hinder the ability of African Americans to participate in the political process. The plaintiffs contend that the vote dilution effects of the four at-large seats are exacerbated by the economic disparities between the black and white populations, particularly as a county-wide at-large campaign is allegedly more expensive than a campaign for a smaller, single-member district. The plaintiffs charge that there is no legitimate public policy in favor of the use of the four at-large seats and that the use of these seats dilutes the vote of African Americans in Marion County, impairs their ability to elect the candidates of their choice, and thus violates Section 2 of the Voting Rights Act, 42 U.S.C. §1973.

The relief sought by the plaintiffs includes a request for a declaratory judgment finding that the at-large election of four seats on the Council violates the Voting Rights Act, as well as a request for injunctive relief preventing the holding of any further elections, including the next primary election scheduled to occur on May 7,

1991, under the current method of selecting at-large representatives. The plaintiffs also seek attorney fees, costs and expenses. On April 3, 1991, the plaintiffs filed their motion for a preliminary injunction against the holding of the May 7th primary election.

The defense, as summarized, maintains that much of the plaintiffs' evidence is not relevant to the legal issue actually before the court, to wit, whether this court is empowered under the Voting Rights Act to grant the requested relief in light of the fact of proportional representation of the African American population of Marion County on the Council. This defense is presumably based on the belief that the review of the Ordinance should involve a prospective analysis, rather than a more typical retrospective examination.

III. Discussion

In order to obtain a preliminary injunction, the movants must initially establish that:

> (1) they have no adequate remedy at law; (2) they will suffer irreparable harm if the injunction is not granted; and (3) they have *some* likelihood of success on the merits in the sense that their "chances are better than negligible." *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386-87 (7th Cir. 1984); *see also Lawson Products, Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986). If the movant[s] can meet this threshold burden, the inquiry then becomes a "sliding scale" analysis of the harm to the parties and the public from the grant or denial of the injunction and the actual likelihood of success on the merits. In particular, and keeping in mind that the public interest may become more important in a given case, the "more likely the plaintiff[s are] to win, the less heavily need the balance of harms weigh in [their] favor [in order

> to get the injunction]' the less likely [they are] to win, the more need it weigh in [their] favor." *Roland Machinery*, 749 F.2d at 387.

Ping v. National Educ. Ass'n., 870 F.2d 1369, 1371-72 (7th Cir. 1989) (*quoted in Thornton v. Barnes*, 890 F.2d 1380, 1384 (7th Cir. 1989)).

Since all of the evidence and most of the arguments raised in connection with this motion have been directed at the plaintiffs' likelihood of success on the merits, the court will initially focus on this factor.

Section 2 of the Voting Rights Act, 42 U.S.C. §1973, as amended by Congress in 1982, provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), is the only Supreme Court case to date to construe the amended Section 2. In *Thornburg*, the Supreme Court outlined three circumstances which it thought would usually be:

> necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice. . . . First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.

Id., 478 U.S. at 50-51, 106 S.Ct. at 2766-67 (citations and footnote omitted).

The Supreme Court noted that it had long recognized the potential for at-large voting schemes to cancel out the voting strength of minorities. *Id.*, 478 U.S. at 47, 106 S.Ct. at 2764. However, relying on the Senate Judiciary Committee Majority Report which accompanied the bill amending Section 2, S.Rep. No. 417, 97th Cong., 2nd Sess. 28, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177 ("Senate Report"), the Court found that "electoral devices, such as at-large elections, may not be considered *per se* violative of §2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process." *Thornburg*, 478 U.S. at 46, 106 S.Ct. at 2764 (citation omitted).

At the April 17th hearing, the plaintiffs presented evidence to establish that the three preconditions to a showing of vote dilution existed in Marion County. The

plaintiffs submitted a number of affidavits at the hearing. Among those was the affidavit of Sam H. Jones, president and chief executive officer of the Indianapolis Urban League, Inc. Mr. Jones testified that at-large districts diluted black votes, and that African Americans in Marion County are a politically cohesive and largely Democratic group. William A. Crawford, a member of the Indiana House of Representatives who is involved in numerous civic and political organizations, opined in his affidavit that African Americans are a politically cohesive group in Marion County. Council member Rozelle Boyd testified that black and white voters in Marion County form politically cohesive, yet separate, groups, with the majority white voting bloc usually defeating the candidate of choice of the minority black voting bloc.

In addition, Gordon G. Henderson testified on behalf of the plaintiffs. Dr. Henderson received his Ph.D. in Public Law and Government from Columbia University in 1962, and has been on the political science faculties of several colleges and universities, as well as a member of numerous professional organizations. Dr. Henderson has authored several books and articles in the political science field. He testified that he has focused over the last five years on the statistical analysis of elections and has previously qualified as an expert in conducting such analyses.

Dr. Henderson testified that he relied upon census data and maps for 1980 and 1990, election returns for 1983, 1984, and 1986 through 1990, as well as maps showing election units in Marion County, in performing his statistical analysis. According to Dr. Henderson, the 1990 census data indicates that the population of Marion County is 797,159, which includes an African American

population of 169,654, or approximately 21.28% of the total population. The total voting age population of Marion County is 593,974, which includes an African American voting age population of 114,534, or approximately 19.28% of this total.

The two methods of statistical analysis performed by Dr. Henderson to determine the extent of racially polarized voting in Marion County were bivariate regression and homogeneous precinct (or extreme case) analysis. Dr. Henderson noted initially that he found the black population in Marion County to be geographically compact, with 114,882 African Americans residing in 228 contiguous precincts, with each precinct having at least a twenty percent black population. The results of Dr. Henderson's statistical analyses are set forth in plaintiffs' Exhibit H. Based on his analysis of various elections occurring from 1983 to 1990, Dr. Henderson concluded that each election showed evidence of racially polarized voting, meaning that the candidate of choice for white voters was different from the candidate of choice for black voters. Generally, Dr. Henderson concluded that African Americans in Marion County are a large, geographically compact and politically cohesive group, and that the white majority votes sufficiently as a bloc to defeat the minority candidate of choice. Dr. Henderson testified that he believed that the use of at-large districts would lead to the defeat of the candidate of choice in Marion County.

Dr. Henderson also analyzed previous Marion County districting plans. He found that the 1982 plan had a racially discriminatory impact in that it both "packed" and "cracked" the African American population (referring to the practices of concentrating African Americans in districts in greater concentrations

that their proportion of the population and of splitting African Americans into different districts to reduce the concentration of their voting strength, respectively). Dr. Henderson concluded that the 1982 plan created four black majority districts while the districting scheme could have been drawn to create six such districts. Dr. Henderson reached basically the same conclusions with respect to the 1971 and 1974 Council districting plans.

On cross-examination, Dr. Henderson testified that he had participated in the drafting of the plaintiffs' February 26th plan which was submitted to the Council by attorney Steve Laudig. That plan had seven black majority districts, each with from 56% to 60% black population. Dr. Henderson also recognized that the plan adopted by the Council had seven black majority districts as well, although these had African American populations in the low 60% range.

When questioned, Dr. Henderson agreed that African Americans represented 21.28% of the population of Marion County, and that seven of twenty-nine Council seats equaled 24.14% of the seats on the Council. However, Dr. Henderson, maintained that four super-districts, one of which would be a black majority district, should be created to replace the existing four at-large seats. This would in effect mean that roughly 28% of the Council seats would be in the black majority districts. When asked if 21% of the population should get 28% of the Council seats, Dr. Henderson answered yes, and explained that this was compelled by the segregated housing patterns which Dr. Henderson believed created an advantage for white voters with respect to the at-large seats.

In addition to the three factors listed in *Thornburg* which would normally be required for a showing of vote dilution, the Supreme Court noted that the totality of the circumstances was relevant in determining whether an electoral device resulted in unequal access to the electoral process. *Thornburg*, 478 U.S. at 46, 106 S.Ct. at 2764. As evidence of the totality of the circumstances, and in addition to the affidavits of Sam Jones, Rozelle Boyd, and William Crawford, the plaintiffs submitted the affidavit of historian Leonard Moore, assistant professor of history at Reed College. Dr. Moore testified about the history of race discrimination in Indiana generally and in Marion County in particular. Dr. Moore described patterns of discrimination that began before 1787, when blacks were being brought into the state as slaves. Dr. Moore also made observations about the current socioeconomic inequalities facing the African American population in Indiana, including higher unemployment and infant mortality rates, and a lower median household income. The plaintiffs also submitted a photocopy of the book *Since Emancipation: A Short History of Indiana Negroes, 1863-1963*, written by Emma Lou Thornbrough (Exhibit Q), as well as excerpts from the *History of the Indiana General Assembly* (Exhibit R).

Dr. John Leill, a sociologist and professor emeritus at Indiana University who received his Ph.D. from Yale, also testified as an expert witness for the plaintiffs. Dr. Leill used data from the 1980 and 1990 census reports, as well as vital statistics from the Marion County Health Department, to analyze seven topics: employment and unemployment figures, family income, poverty characteristics, the year of school completed by race, death by age and race, racial identity in census tracts, and infant mortality.

The picture painted by Dr. Leill's testimony showed disparities between the black and white populations of Marion County in many areas. Labor force data prepared for 1979 and published in 1980 showed that the percentage of unemployment for blacks in Marion County was much higher than that of whites. Exhibit T-2. Based on 1980 census data, Dr. Leill noted a "marked discrepancy" between the family incomes of black and white householders, with the income of black householders being lower. Exhibit T-3. Among persons for whom poverty had been determined, based on 1979 data, Dr. Leill found that 7.9% of the white population of Marion County, as compared to 23.1% of the African American population, was below the poverty level. Exhibit T-4. Dr. Leill also found that in 1980, the white population of Marion County was more highly educated than the black population, with white individuals 25 years of age and older having completed an average of one more year of education than black persons. Exhibit T-5. Plaintiffs' Exhibits T-6(a) through (j) contain infant mortality data used by Dr. Leill, including one table (Exhibit T-6(b)) which showed the infant mortality rate for African Americans in Indianapolis to be roughly two and a half times as great as the rate for whites. A computer run performed by the Marion County Department of Health on July 16, 1990, at the request of Dr. Leill, showed that from 1981 to 1989 in Marion County, the median age at death for black (listed in the "Other" category) males (65) was lower than that of white males (70), and the median age at death for black females (71) was lower than that of white females (77). Exhibit T-7. Dr. Leill also examined Marion County housing patterns by race in 1970 and 1980 (Exhibits T-8 through T-11) and found a considerable amount of residential segregation in the county, although it had

decreased a little by 1980. Dr. Leill testified that a 1981 school desegregation order for Marion County produced no changes in housing patterns.

Overall, Dr. Leill testified that every measure of socioeconomic status or privilege continued to show an advantage for white persons. He attributed this disparity to the traditional operation of our culture which assigns blacks and whites to different roles and manages opportunities between blacks and whites on the basis of self-fulfilling prophecies. When asked whether the lower socioeconomic status of African Americans affects their ability to participate in the political process, Dr. Leill answered that, based on residential patterns, African Americans did not have an equal opportunity to express their interests, and that the prejudiced attitude of white citizens would permit things to continue without change.

The defendants submitted the 1990 census population data for Marion County (Exhibit 12) as well as a copy of the redistricting Ordinance (Exhibit 13). Four affidavits were submitted, in addition to two excerpts from the book *Governing Metropolitan Indianapolis* by C. James Owen and York Willbern. David Fasenbest, a member of the faculty at Purdue University with a Ph.D. in sociology, testified based on his examination of 1990 census data and the Ordinance. Various maps and charts were submitted detailing precinct and district lines as well as population distributions and racial compositions for the precincts and districts. Exhibit 4 contains the results of Dr. Fasenfest's calculations, indicating that under an ideal twenty-five seat districting scheme for Marion County, each district would contain 31,886 persons. Under the newly-adopted scheme, the total range of deviation between the most and least populous districts is 3.08%.

Exhibit 7 contains the results of more calculations based on population figures, including the statistic that the total black population is 21.28% of the total population, which, taken as a share of 29 district seats, would yield 6.17 seats.

Based on these figures, the defendants argue that the proportionality between the black population of Marion County and the number of black majority districts is a defense to the plaintiffs' Voting Rights Act claim. The plaintiffs' own expert, Dr. Henderson, testified that the Ordinance created seven black-majority districts. Seven of twenty-nine districts is roughly 24.14% of the total. There is no dispute that the African American population is 21.28% of the total population in Marion County.[2]

The question is thus whether the uncontestedly proportional representation of African Americans is a defense to the plaintiffs' Section 2 claim. The plaintiffs argue that this defense is flawed in two ways. First, they contend that the defendants err when they link the issue of the four at-large seats with the other twenty-five seats on the Council. Second, they contend that proportionality is not a defense under Section 2 of the Voting Rights Act.

With respect to the propriety of considering the districting scheme as a whole or only looking at the effect of the four at-large seats, the plaintiffs argue that Section 2 allows for a challenge to any "standard, practice, or procedure," and that they are entitled to

[2] Although the court is relying upon the total population figures, the court notes that a comparison of voting age populations would not assist the plaintiffs. As noted above in connection with Dr. Henderson's testimony, the African American voting age population is approximately 19.28% of the total voting age population.

limit their challenge to the four at-larges if they so choose. In support of their position, the plaintiffs cite a recent decision by Judge McKinney in *Dickinson v. Indiana State Election Board,* No. IP90-200-C, (S.D. Ind. May 17, 1990) (Order on Defendants' Motion to Strike Complaint and Motion for Sanctions). The plaintiffs in *Dickinson* brought a Section 2 action challenging House Districts 49 and 51 to the Indiana General Assembly. The defendants in *Dickinson* argued that the two districts should be considered as a whole, which, if done, would allegedly have yielded proportional representation. Judge McKinney, relying on language from *Thornburg* which stated that the inquiry into vote dilution is "district specific," 478 U.S. at 59, n. 28, 106 S.Ct. at 2771, rejected the defendants' argument that the two districts should be examined as a whole. *Dickinson,* slip op. at 8.

This judge agrees with the defendants that *Dickinson* is distinguishable from the case at bar. The districts challenged in *Dickinson* were geographically separate, as were the districts in *Thornburg.* In this case, however, the four challenged at-large seats are, pursuant to state law, filled by "members elected from an at-large district *containing the whole county.*" IC 36-3-4-3(b) (emphasis added). The Senate Report accompanying the amendments to Section 2 provided that in order to establish a violation, "[p]laintiffs must either prove [discriminatory] intent, or, alternatively, must show that the challenged system or practice, *in the context of all the circumstances in the jurisdiction in question,* results in minorities being denied equal access to the political process." Senate Report, 1982 U.S. Code Cong. & Admin. News at 205 (emphasis added). Since the relevant district is the entire county, the representational scheme throughout the county for the overall legislative body

must be considered in determining whether the plaintiffs' ability to participate has been diluted or otherwise impaired. Neither *Thornburg* nor *Dickinson* stands for the proposition that a court must consider fewer than the total number of representatives in the challenged district.

The Supreme Court's opinion in *Board of Estimate v. Morris*, 489 U.S. 688, 109 S.Ct. 1433, 103 L.Ed.2d 717 (1989), supports the idea that the twenty-nine seats on the Council should be considered as a whole. *Morris* involved an equal protection challenge to New York City's Board of Estimate, which was composed of three at-large members (including the mayor) plus the elected president of each of the city's five boroughs. Although this was not a Voting Rights Act case, the ultimate issue was similar to the present one: whether the votes of citizens were given approximately equal weight to guarantee fair representation for all. *Id.*, 489 U.S. at 701, 109 S.Ct. at 1441. The court of appeals decided not to take the three at-larges into account in calculating the population deviation between the smallest and the largest boroughs because the at-larges and the five borough presidents purportedly responded to different constituencies. The Supreme Court rejected this approach, noting:

> Here the voters in each borough vote for the at-large members as well as their borough president, and they are also represented by those members. Hence in determining whether there is substantially equal voting power and representation, the citywide members are a major component in this calculation and should not be ignored.

Id., 489 U.S. at 701, 109 S.Ct. at 1441-42 (footnote omitted). The decision in *Morris* thus suggests that the defendants here are correct in arguing that all twenty-nine Council seats must be considered together.

In addition, such an approach appears compelled by the Voting Rights Act itself, as well as by *Thornburg*. As noted above, the Supreme Court in *Thornburg* relied on the Senate Report when it stated that "[p]laintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process." *Thornburg*, 478 U.S. at 46, 106 S.Ct. at 2764 (citation omitted). This broad analysis is required by the language of Section 2, which provides that a violation is established if:

> based on the totality of the circumstances, it is shown that the political processes leading to nomination or election ... are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Since the issue in this case is the ability of African Americans in Marion County to elect representatives of their choice to the Council, an examination of the totality of the circumstances implicates the ability of African Americans to elect representatives to the Council from single-member as well as at-large districts. The court thus rejects the contention that its focus must be limited solely to the four at-large seats.

Beyond contesting this consideration of all the seats on the Council, the plaintiffs challenge the idea that proportionality is a defense to a Section 2 action. To some extent, the plaintiffs appear to misconceive the defense. The plaintiffs characterized the defense as an argument that each race is entitled to a given number of representatives—no more and no less. Of course, the very language of Section 2 refutes this proposition; "nothing in this section establishes a right to have members of a

protected class elected in numbers equal to their proportion in the population." The plaintiffs claim that the proportionality defense, so conceived, ignores the possibility of white crossover voting. The plaintiffs hypothesize that if enough white voters voted for black candidates, that the black population could wind up being over-represented, which according to the plaintiffs' understanding of the proportionality defense would necessitate yet another redistricting to correct the imbalance.

However, the court's understanding of the proportionality defense is quite different from that of the plaintiffs. Section 2 makes clear that a plaintiff may not successfully argue for increased representation simply because a protected group is not currently represented in proportion to its numbers. What the defendants argue is that Section 2 cannot be used as a tool to provide more representation when the protected class is already represented in proportion to its percentage of the population. This is not to say that Section 2 provides a ceiling; rather, it means that the Voting Rights Act is not a tool which can be used to provide more than proportional representation.

Precedent favors the proposition that proportionality is a defense under Section 2, which by its own terms seeks to ensure that the political processes are "equally open to participation" by members of a protected class. Proportionality was a defense in *Thornburg*. In part IV-B of his opinion, Justice Brennan, joined by Justice White, found that the district court had erred in ignoring the sustained successes of black voters in one district: "This persistent proportional representation is inconsistent with appellees' allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority." *Thornburg*,

478 U.S. at 77, 106 S.Ct. at 2780. Concurring in the judgment of the Court, Justice O'Connor wrote an opinion joined by Justices Burger, Powell and Rehnquist in which she agreed with Justice Brennan "that consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a §2 violation." *Id.*, 478 U.S. at 102, 106 S.Ct. at 2793. Moreover, since the plaintiffs have conceded that the Ordinance provides for seven black majority districts, there is no concern here with the need to review and "appropriately take account of the circumstances surrounding recent black electoral success in deciding its significance. . . ." *Id.*, 478 U.S. at 76, 106 S.Ct. at 2779.

The plaintiffs cite *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977), in support of their position. *Carey* involved Fourteenth and Fifteenth Amendment challenges to a redistricting plan which split an Hasidic Jewish community in Kings County, New York, into separate districts. In their brief, the plaintiffs anticipate an argument by the defendants "that creating another black majority district would give blacks greater than proportionate representation on the Council and thus violate the rights of non-black voters" and claim that *Carey* rejects this argument. Brief in Support of Plaintiffs' Motion for Preliminary Injunction, p. 22, n. 12. The defendants' proportionality defense, however, does not reach the issue of whether another black majority district should or must be added so much as it asserts that Section 2 simply does not empower the court to award a minority group with more than proportional representation. In announcing the judgment of the Court in *Carey* in a portion of his opinion joined by Justices Stevens and Rehnquist, Justice White affirmed the standard of proportional representation for

voters, albeit in the context of a constitutional challenge, noting that "as long as whites in Kings County, as a group, were provided with fair representation, we cannot conclude there was a cognizable discrimination against whites. . . ." *Carey*, 430 U.S. at 166, 97 S.Ct. at 1010.

The plaintiffs also suggest that the defendants are focusing on the race of the officeholder, rather than the voter, in advancing their proportionality defense. The court disagrees. The proportionality defense is based on the fact that minority voters are given an opportunity to elect candidates of their choice, of whatever race, in proportion to the percentage of minority voters in the jurisdiction at issue.

Although the court believes that in light of the proportionality defense the plaintiffs have demonstrated little likelihood of success on the merits in this litigation, that is not to say that we are unmindful of or in any way dispute the widespread effects of discrimination in Indiana. The court could almost take judicial notice of the fact of such discrimination. Indeed, the evidence on this point admitted at the hearing went largely unrebutted. The court also would note that the prior districting scheme initially challenged in this litigation, which only provided for what were considered four black majority districts, would have likely been subject to very serious Voting Rights Act challenges.

It was the court's hope that, by entering the September 25, 1990 consent decree, the Council would take advantage of the opportunity to redistrict itself on the basis of current census data in order to achieve more proportional representation and thus comply with all the relevant constitutional and statutory requirements. It appears to this judge that the Council has done that, specifically by adding three black majority seats. Since this plan was enacted by the Council, it is entitled to

deference. *Upham v. Seamon*, 456 U.S. 37, 102 S.Ct. 1518, 71 L.Ed.2d 725 (1982); *Tallahassee Branch of NAACP v. Leon County*, 827 F.2d 1436, 1438 (11th Cir. 1987), *cert. denied*, 488 U.S. 960, 109 S.Ct. 402 (1988).

IV. Conclusion.

Accordingly, the court finds that the newly-adopted Ordinance provides seven black majority seats on the Council, roughly 24.14% of the total twenty-nine seats, and that this number provides essentially proportional representation to the African American population in Marion County, which constitutes 21.28% of the total population. The court has concluded that all the representatives to the Council must be considered in assessing the plaintiffs' challenge to the four at-large seats. The court further concludes that the proportional representation of African Americans on the Council satisfies the Section 2 requirement that they have equal access to the political process. Because the plaintiffs have not established a likelihood of success on the merits, they are not entitled to injunctive relief. Even assuming that they proved more than a minimal chance of success, the public interest in having the May 7th primary election proceed without delay is great. To postpone the primary would impose additional costs on the county and raise the possibility of disappointingly low voter turnout at a subsequent election for Council members. The plaintiffs' motion for a preliminary injunction is therefore DENIED.

It is so ORDERED this 25th day of April, 1991.

/s/ SARAH EVANS BARKER
Sarah Evans Barker, *Judge*
United States District Court
Southern District of Indiana

JOINT STIPULATION AND CONSENT DECREE

(Approved September 25, 1990)

Cause No. IP 87-111 C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JUNE MURRAY, *et al.*,
Plaintiffs,

vs.

THE CONSOLIDATED CITY OF
INDIANAPOLIS, *et al.*,
Defendants.

HON. SARAH EVANS BARKER, Presiding

HON. J. PATRICK ENDSLEV, Magistrate

JOINT STIPULATION AND CONSENT DECREE

Come Plaintiffs, by Counsel, and Defendants, by Counsel and desiring to avoid the necessity and uncertainty of a trial in this matter stipulate and agree as follows:

1. Indiana Statute does not require the Indianapolis-Marion County City-County Council [hereinafter Council] to redistrict until 1992.

2. The parties agree that a redistricting will occur before it is required by statute and before the next election for the Council.

3. The Plaintiffs are not, by entering into this agreement, agreeing to the continuation of the at-large seats on the Council or to the validity of the at-large seats on the Council nor to the lawfulness of the current districts.

4. The 1990 U.S. Census data is necessary for the redistricting of the Council and should be available to the Defendants on or before April 1, 1991.

5. The 1991 redistricting of the Council will be based on the 1990 U.S. Census data in a manner which results in districts which are comply with all pertinent state statutes and do not violate the United States Voting Rights Act, 42 U.S.C. 1973[a] *et seq.* The Defendants agree that the new districts will abide by commonly recognized standards for redistricting including: a] non-dilution of minority voting strength; 2] contiguity; 3] compactness and 4] respect for the principle of one person, one vote.

6. The Council will be given the opportunity to abolish, or change the manner of voting for, the four [4] at-large seats on the Council.

7. The May 1991 primary municipal election will, if necessary, be postponed in order to permit elections under the new districts based upon the 1990 U.S. Census.

8. The parties will, if necessary, agree upon a date for the primary. If the parties cannot agree on a date, the Court will establish a new date for the primary and enter an order superseding and pre-empting Indiana election laws to the extent necessary for a primary election at the postponed date.

9. The Defendants will make the 1990 U.S. Census data available to Plaintiffs, in computer readable and hardcopy form, when it is received by the Defendants without the necessity of a written request by Plaintiff.

10. Plaintiffs, along with any other interested persons or parties, shall have the right to submit their own proposed redistricting plan to the Council for its consideration.

11. Plaintiffs, along with any other interested persons or parties, shall have the right to submit their own proposed ordinance with regard to abolishing, or changing the manner of voting for, the four [4] at-large seats on the Council.

12. The Council will hold at least two [2] public hearings, separated by at least two [2] weeks on any proposed redistricting ordinance and at least one [1] public hearing on any proposed ordinance with regard to abolishing, or changing the manner of voting for, the four [4] at-large seats on the Council before passage.

13. The Council will give meaningful consideration to all redistricting plans and proposed ordinances with regard to abolishing, or changing the manner of voting for, the four [4] at-large seats on the Council submitted to it for such consideration.

14. The Defendants agree that the Plaintiffs are entitled to videotape and/or audio tape all committee and/or Council meetings and hearings regarding redistricting plans and proposed ordinances with regard to abolishing, or changing the manner of voting for, the four [4] at-large seats on the Council.

15. Plaintiffs will be notified no less than seventy-two [72] hours prior to any committee and/or Council meeting regarding the redistricting plans and proposed

ordinances with regard to abolishing, or changing the manner of voting for, the four [4] at-large seats on the Council submitted to it for such consideration.

16. The Defendants will identify, to the extent they know, without the necessity of a request by the Plaintiffs, by name, author, sender and recipient of all documents, or data, used by the Defendants in the preparation of any proposed redistricting plan and proposed ordinances with regard to abolishing, or changing the manner of voting for, the four [4] at-large seats on the Council.

17. Plaintiffs are entitled to receive, and will receive without the necessity of a written request, internal documents and other data, including any mapping and/or districting computer programs, used in the preparation of any districting plans and/or proposed ordinances with regard to abolishing, or changing the manner of voting for, the four [4] at-large seats on the Council that are required to be disclosed pursuant to the Indiana Open Door Law and Public Record Law and/or the Federal Rules of Civil Procedure.

18. Before any Council redistricting ordinance or ordinance abolishing, or changing the manner of voting for, the four [4] at-large seats on the Council is finally enacted by the City-County Council it shall be submitted to this Court for review and approval after a public hearing.

19. Plaintiffs shall have the right to appear before the Court and comment upon, or object to, the districting ordinance and any proposed ordinance which fails to abolish, or changes the manner of voting for, the four [4] at-large seats on the Council submitted to it for such consideration. Plaintiffs are entitled to present their

own redistricting plans and proposed ordinances with regard to abolishing, or changing the manner of voting for, the four [4] at-large seats on the Council.

20. The Plaintiffs' proposed districting and at-large ordinances will be submitted at least ten [10] days before any Court hearing. Any reply by the Defendants will be submitted at least five [5] days before the hearing.

21. All proceedings in this cause are stayed, except for discovery designed to preserve evidence, until the 1990 U.S. Census data is made available to the Plaintiffs. Immediately upon the Defendants receipt of the 1990 U.S. Census data, the Defendants will inform in writing both the Court and the Plaintiffs.

22. The Court, at that time, will approve an accelerated time schedule, if necessary, to allow any redistricting plans and proposed ordinances with regard to abolishing, or changing the manner of voting for, the four [4] at-large seats on the Council to be reviewed by the Plaintiffs in a meaningful manner before any Council redistricting ordinance is approved for final adoption by the Council and also to allow the primary election to be held at a postponed date as provided herein.

23. Plaintiffs shall present any new challenge to the redistricting ordinance or ordinance abolishing, or changing the manner of voting for, or failing to abolish or change the manner of voting for, the four [4] at-large seats on the Council by way of an amended complaint in this action.

24. The parties may use any and all discovery and other pleadings, including all exhibits, filed in this cause, just as if these documents had been filed in this cause in 1991 with reference to the proposed new redistricting ordinance or the ordinance fails to abolish, or change the

manner of voting or, or failing to abolish or change the manner of voting for, the four [4] at-large seats on the Council, to the extent that these documents are relevant to any new challenge to the redistricting ordinance or ordinance abolishing, or changing the manner of voting for, the four [4] at-large seats on the Council.

25. Plaintiffs specifically reserve the right to petition this Court for an award of attorneys fees and costs related to this action as provided for in the Voting Rights Act.

/s/ STEPHEN LAUDIG
Attorney for Plaintiffs

/s/ WILLIAM M. EVANS
Attorney for Defendants

MARGO BARBER
Attorney for Defendants

Approved and so ordered:

SARAH EVANS BARKER
United States District Court

9/25/90
Dated

AFFIDAVIT OF ROZELLE BOYD IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Cause No. IP 87-111 C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JUNE MURRAY, *et al.*,
Plaintiffs,

vs.

THE CONSOLIDATED CITY OF INDIANAPOLIS, *et al.*,
Defendants.

HON. SARAH EVANS BARKER, Presiding

HON. J. PATRICK ENDSLEY, Magistrate

AFFIDAVIT OF ROZELLE BOYD

I, Rozelle Boyd, state the following to be true under the penalties for perjury:

1. I am an African-American and a plaintiff in the action titled, *Murray v. City of Indianapolis.*

2. I will be 57 on the 24th of April.

3. I have lived in Indianapolis for 57 years.

4. I was born in Indianapolis, IN.

5. I attended Public School Number 87.

6. I attended Crispus Attucks High School while it was still racially segregated. I went to Butler University and obtained a B.A. in History and Political Science. I obtained my M.A. in U.S. History.

7. I have taught in the Indianapolis Public Schools until 1968.

8. I have been employed by Indiana University since 1968 and am presently the Director of the University Division.

9. I have been on the City-County Council since 1971 elected from Council District Ten and am now the Minority Leader. Prior to that I was a member of the County Council. At the time I was elected to the County Council there were 5 seats on the County Council.

10. I have been on most of the committees of the City County Council and have been the minority leader several times.

11. I am particularly interested in affirmative action in city government employment practices, especially law enforcement. In my opinion there is a long history of racial discrimination in the hiring and promotion practices in Indianapolis and Marion County law enforcement organizations. Recently the Indianapolis Police Department, pursuant to a consent decree, has improved its hiring practices with regard to women and minorities. The Marion County Sheriff Department's performance with regard to hiring and promotion of minorities has been lacking.

12. Based upon my observations as a Council member, it is my opinion that there is a severe and discriminatory difference in the enforcement of criminal laws in Indianapolis between whites and minorities.

13. I can recall, particularly 1970 when Vance Hartke and Richard Roudebush were candidates for the U.S. Senate and in 1971 when then-Mayor Lugar was seeking re-election, when the Indianapolis Police Department would park patrol cars outside polling places on election day in an attempt to intimidate and suppress Black voter turnout. The Prosecutor's race recount which is presently going on has targeted inner city precincts and has had the affect to intimidate minority voters and minority precinct workers.

14. As a member of both the City or County council and the City County Council, I have been involved in a total of four [4] redistrictings.

15. The first districting of which I have personal knowledge occurred in 1971.

16. The second occurred in 1975.

17. The third occurred in 1982.

18. The fourth occurred in 1991.

19. The 1971 redistricting was the first districting which occurred under Unigov. It resulted in only four [4] Black majority districts.

20. Those districts were District 9 which elected Henri Gibson, District 10 which elected Artricia Noel, District 11 which elected me and District 16 which elected Harold Hawkins.

21. The 1975 redistricting resulted in only four [4] Black majority districts.

22. District 9 which elected Glenn Howard, District 10 which elected Lula Journey, District 11 which elected me and District 16 which elected Harold Hawkins. All four of us were re-elected in the 1979 municipal elections.

23. The 1982 redistricting resulted in only four [4] Black majority districts.

24. District 9 which elected Glenn Howard, District 10 which elected Luia Journey, District 11 which elected me and District 16 which elected Harold Hawkins in the 1983 Municipal elections.

25. The 1975 redistricting was not required by statute and was done because the Republican white majority on the Council was concerned that it would lose its majority on the Special Service District Councils. The Special Service District Councils set budgets for, among other things, the Police and Fire Special Service Districts. They have taxing authority. They are legally separate from the Consolidated City of Indianapolis.

26. The Special Service District Councils, as first established under Unigov, were to be composed of all the members of the Council who had been elected from an electoral district, provided that sixty per cent [60%] of more of the population in the county was within the territorial limits of the Special Service District. Practically this meant the old City.

27. Between 1971 and 1975 it became clear that very soon the Special Service District Councils dealing with the Indianapolis Police and Fire District would have a Democratic majority sitting on them. This change is what prompted the white majority on the Council to redistrict. It was done in order to maintain control over the taxing and budgetary power of the Special Service District Councils.

28. In the late 1970's, at the request of the white Republican majority on the Council the percentage requirement was reduced by the State legislature to provide so that Council members whose electoral district

had only fifty per cent [50%] or more of its population within the territorial limits of the Special Service District could sit on the Special Service District Council and also that the four [4] at large members of the council could sit on the Special Service District Councils. This modification was obtained by the white majority on the Council to prevent Black council members from obtaining a working majority on the Special Service District Councils.

29. In the early 1980's, after the 1982 redistricting, the white majority on the Council sought and obtained a further modification of the statute establishing which council members could sit on the Special Service District Council, so that every member of the city-county legislative body sat on the Council. This was done to assure that the Black council members would not be able to form a working majority in the Special Service District Councils.

30. Special Service District Councils, particularly the Police and Fire Special Service District Councils have important control over the budgets of the Indianapolis Police and Fire Departments. Control over budgets means that the Special Service District Council could also affect the hiring, promotion and discharge policies of the Indianapolis Police and Fire Department. It also means that important changes could be effectuated with regards to police community relations. Finally it means that non-residents of the Special Service Districts elect a majority of the Council which imposes taxes on the residents of the Special Service District. This is, of course, a form of taxation without representation because property tax on the property within the Special Service District constitutes the largest portion of the IPD and IFD budget.

31. The redistrictings which occurred in 1971, 1975 and 1982 were totally and completely controlled by the white Republican majority on the council. The minority incumbents, myself, Harold Hawkins, Glenn Howard and Lula Journey were, in essence, presented with a plan by the white council leadership and informed that the only suggested changes to be adopted would be minor ones which would not affect the outcome of any election contest. The Republicans' stated and achieved intent was to keep the number of seats where Democrats could be elected at an absolute minimum. Councilor Steve West's district in particular was drawn to dilute African-American votes in the old city with white suburban votes.

32. The result of all of the redistrictings done since Unigov was adopted was the packing of the African-American minority into only four [4] districts when, in my opinion at least six [6] could have been created in 1971, 1975 and 1982.

33. In sharp contrast, the redistricting which has accord because of this Court's consent decree has almost doubled the number of seats which minorities will be able to elect to the council. Until this Court's September 25, 1990 Consent Decree, there had never been any public discussion about the need to not pack minority voters into as few districts as possible. As a result of the Court's Decree the Republican white dominated majority has had to make it possible for minorities to elect three [3] more councilors for a total of seven [7].

34. Creating these three [3] additional seats was not a gratuitous act on the part of the White majority on the Council. It would *not* have happened but for the *Murray* litigation and the Consent Decree. As a result of having three [3] more councilors elected by the African-American

community we will be able to have more oversight on one of the widely recognized major problems facing the minority community: police community relations.

35. Based upon my observations as a Councilor, African-American areas of Indianapolis receive inferior city services such as street and sidewalk cleaning, street and sidewalk repair, fire protection, police protection, flood control, and storm sewers.

36. In my opinion, based upon my observations as a member of the City-County Council for over 20 years and on the County Council before that the political process in Indianapolis and Marion County is not equally open to minority voters. An example of this is the slating procedures in effect in the major political parties. Both parties have slating.

37. A slating fee, which is perhaps a necessary evil, is charged by both parties which is calculated as a percentage of the salary for position which the person is seeking slating. This, of course, has the effect of preventing and discouraging poor people and impacts the African-American community more than the majority white community from seeking or obtaining a party's endorsement. The slating fee for the Democratic party for City County Council is Eight Hundred and Ninety Dollars [$890.00] this year. This also has the effect of lessening the opportunity for African-Americans to participate in the political process and to elect representatives of their choice.

38. At the time that Unigov was adopted by the legislature in 1969-1970, it was my opinion, and the opinion of many members of the African-American community that it was intended to and had the effect of preventing any African-American from being elected

Mayor of Indianapolis. In my opinion, had Unigov not been adopted Old Indianapolis would have by now, quite probably, elected an African-American as Mayor.

39. Based upon my observations of more than 20 years in municipal government and more than that in local politics, African-Americans in Indianapolis and Marion County bear the effects of discrimination in such areas as education, employment and health which hinder their abilities to participate effectively in the political process, e.g., there has been historic discrimination in education, housing, employment and health services in Marion County and Indianapolis. Income levels vary in Indianapolis between Whites and Blacks. The effect of official and historical discrimination is evidenced by the fact that Marion County Whites have a lower level of unemployment. Whites have a higher educational level, Whites have a higher income level and have a greater percentage of home ownership than Blacks.

40. There is dilution of Black voting strength in Indianapolis and Marion County by submerging the minority vote in multi-member districts to the Indiana House of Representatives and the at-larges to the Council. These practices enhance the opportunity for discrimination against a minority group.

41. There are several at-large voting systems or multi-member districts in Indianapolis and Marion County. In Marion County, the Township Legislative Bodies, commonly known as the Advisory Board are elected at-large.

42. All members of the Indiana House of Representatives elected in Marion County are elected from multi-member Districts. Black voters are less able to elect their candidates of choice for State

Representative because of the use of multimember house districts in Marion County. Indeed, there are only three types of single member districts in Marion County:

a] U.S. Congressional Districts;
b] State Senate Districts; and,
c] City-County Council Districts.

43. Marion County Black voters tend to vote as a block for candidates and the White voting bloc majority in Marion County usually defeats the candidates of choice of the politically cohesive, geographically insular minority Black vote.

44. I agree with Marion County Republican Chairman John Sweezy when he testified, in his deposition at pages 84-85, that the cost of running at-large is significantly higher than in a district.

45. There is a history of lack of proportional representation. There has never been an at-large candidate, either white or African-American, for the City-County Council nominated and elected by Black voters.

46. There are only three Black Superior Court Judges out of fifteen judges. Two were elected and one was *appointed*. Superior Court Judges in Marion County are *all* elected at-large. Black candidates of choice for the State Legislature constitute only 3 out of 15 in Marion County. There are only 4 City-County Council members who were elected by Black voters.

47. There are no Black Small Claims Court Judges, out of 9. There are only 3 Black Township Advisory Board members of the 27. There are no Black constables out of 9. There is only one Black Trustee out of 9. There are no Black Township Assessors out of 9.

48. I have known the following African-American members of the City-County Council who were elected at-large:

Roger Brown
Paula Parker-Sawyers
Julius Shaw
Beverly Mukes-Gaither
Ray Crowe

49. They all happen to be Republicans. It is my understanding that for the last 25 years the Republican slating process by which these and other candidates were selected, or slated, to be their party's candidate consisted of individuals appointed by the Marion County Republican Chairperson and consisted of approximately 50 or so persons. These individuals interviewed and screened candidates for the at-large position.

50. Based upon my observations as a Council member, as a member of the African-American Community, and as someone intensely active in the political affairs of the minority community, none of these individuals were the candidate of choice of the African-American community. I fully expect that there will be fewer Republican Blacks on the Council in 1992 than there are presently.

51. In my considered opinion it is clear that the lingering effects of past discriminatory actions against Blacks are apparent in education, employment and health, all of which institutionally hinder their ability to participate effectively in the political process.

52. It is also my opinion that at-large elections weigh heavily against inner-city racial minorities. At-large districts and multi-member districts are a form of gerrymandering.

53. In Marion County, the at-large system has meant that African-American candidates are carried into office by the discriminatory effect of the at-larges, even though they, themselves, are *not* voted for by the minority community.

54. It is my opinion, based upon my personal observations of these individuals that they have often been unduly pressured by concerns of party to vote interests of party rather than interests of constituency with the exception of police community relations.

I state any foregoing factual assertions to be true under penalties for perjury.

April 15, 1991

ROZELLE BOYD

42 U.S.C. §1973(a)

§1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity then other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered; *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(As amended Pub. L. 97-205, §3, June 29, 1982, 96 Stat. 134.)

INDIANA CODE

36-3-4-3 City-county legislative body; division of county into districts; composition of body; election; petition for division of county

Sec. 3 (a) The city-county legislative body shall, by ordinance, divide the whole county into twenty-five (25) districts that:

(1) are compact, subject only to natural boundary lines (such as railroads, major highways, rivers, creeks, parks, and major industrial complexes); and

(2) contain, as nearly as is possible, equal population.

This division shall be made in 1982 and every ten (10) years after that, and may also be made at any other time, subject to IC 3-1-8-2.

(b) The legislative body is composed of twenty-five (25) members elected from the districts established under subsection (a) and four (4) members elected from an at large district containing the whole county.

(c) Each voter of the county may vote for four (4) candidates for at large membership and one (1) candidate from the district in which he resides. The four (4) at large candidates receiving the most votes from the whole county and the district candidates receiving the most votes from their respective districts are elected to the legislative body.

(d) If the legislative body fails to make the division before the date prescribed by subsection (a) or the division is alleged to violate subsection (a) or other law, a taxpayer or registered voter of the county may petition the superior court of the county to hear and determine

the matter. There may not be a change of venue from the court or from the county. The court sitting en banc may appoint a master to assist in its determination and may draw proper district boundaries if necessary. An appeal from the court's judgment must be taken within thirty (30) days, directly to the supreme court, in the same manner as appeals from other actions.

(e) An election of the legislative body held under the ordinance or court judgment determining districts that is in effect on the date of the election is valid, regardless of whether the ordinance or judgment is later determined to be invalid. *As added by Acts 1980, P.L.212, SEC.2. Amended by Acts 1980, P.L. 213, SEC.2; P.L.346-1983, SEC.2.*